No. 18-272	
Title:	**Jim Yovino, Fresno County Superintendent of Schools, Petitioner** **v.** **Aileen Rizo**
Docketed:	September 4, 2018
Linked with 17A1404	
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Numbers:	(16-15372)
Decision Date:	April 9, 2018

DATE	**PROCEEDINGS AND ORDERS**
Jun 22 2018	Application (17A1404) to extend the time to file a petition for a writ of certiorari from July 8, 2018 to August 23, 2018, submitted to Justice Kennedy. **Main Document** **Lower Court Orders/Opinions** **Proof of Service**
Jun 26 2018	Application (17A1404) granted by Justice Kennedy extending the time to file until August 23, 2018.
Aug 13 2018	Application (17A1404) to extend further the time from August 23, 2018 to September 4, 2018, submitted to The Chief Justice. **Written Request** **Proof of Service**
Aug 15 2018	Application (17A1404) granted by The Chief Justice extending the time to file until September 4, 2018.
Aug 30 2018	Petition for a writ of certiorari filed. (Response due October 4, 2018) **Petition** **Appendix** **Certificate of Word Count** **Proof of Service**
Sep 17 2018	Motion to extend the time to file a response from October 4, 2018 to November 5, 2018, submitted to The Clerk. **Main Document**
Sep 21 2018	Motion to extend the time to file a response is granted and the time is extended to and including November 5, 2018.
Oct 04 2018	Brief amici curiae of The Chamber of Commerce of the United States of America, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Oct 04 2018	Brief amici curiae of Center for Workplace Compliance, et al. filed.

	Main Document	**Certificate of Word Count**	**Proof of Service**
Nov 05 2018	Brief of respondent Aileen Rizo in opposition filed.		
	Main Document	**Certificate of Word Count**	**Proof of Service**
Nov 19 2018	Reply of petitioner Fresno County Superintendent of Schools filed.		
	Main Document	**Certificate of Word Count**	**Proof of Service**
Nov 20 2018	DISTRIBUTED for Conference of 12/7/2018.		
Dec 20 2018	DISTRIBUTED for Conference of 1/4/2019.		
Jan 07 2019	DISTRIBUTED for Conference of 1/11/2019.		
Jan 14 2019	DISTRIBUTED for Conference of 1/18/2019.		
Feb 04 2019	DISTRIBUTED for Conference of 2/15/2019.		
Feb 19 2019	DISTRIBUTED for Conference of 2/22/2019.		
Feb 25 2019	Petition GRANTED. The judgment is VACATED and the case is REMANDED for further proceedings consistent with this opinion. Opinion per curiam. (Detached Opinion). Justice Sotomayor concurs in the judgment.		
Mar 29 2019	JUDGMENT ISSUED.		

NAME	**ADDRESS**	**PHONE**
Attorneys for Petitioner		
Shay Dvoretzky Counsel of Record	Jones Day 51 Louisiana Avenue NW Washington, DC 20001-2113 sdvoretzky@jonesday.com	202-879-3939
Party name: Fresno County Superintendent of Schools		
Attorneys for Respondent		
Daniel Mark Siegel Counsel of Record	Siegel, Yee & Brunner 475 14th Street Suite 500 Oakland, CA 94612 DanMSiegel@gmail.com	(510) 839-1200
Party name: Aileen Rizo		
Other		

Jonathan Saul Franklin
Counsel of Record

Norton Rose Fulbright US LLP
799 9th Street NW
Suite 1000
Washington, DC 20001

2026620466

jonathan.franklin@nortonrosefulbright.com

Party name: The Chamber of Commerce of the United States of America and the Society for Human Resource Management

Rae Thiesfield Vann
Counsel of Record

NT Lakis, LLP
1501 M Street, NW
Suite 1000
Washington, DC 20005

2026295600

rvann@ntlakis.com

Party name: Center for Workplace Compliance and NFIB Small Business Legal Center

No. 18-__

IN THE

Supreme Court of the United States

FRESNO COUNTY SUPERINTENDENT OF SCHOOLS,

Petitioner,

v.

AILEEN RIZO,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Benjamin M. Flowers
JONES DAY
325 John H. McConnell Blvd., Suite 600
Columbus, OH 43215

Elizabeth B. McRee
JONES DAY
77 West Wacker
Chicago, IL 60601

Shay Dvoretzky
Counsel of Record
Jeffrey R. Johnson
Cormac A. Early
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
Tel.: (202) 879-3939
sdvoretzky@jonesday.com

Counsel for Petitioner Fresno County Superintendent of Schools

(additional counsel listed on inside cover)

(continued from front cover)

Michael G. Woods
Timothy J. Buchanan
McCormick, Barstow,
Sheppard, Wayte &
Carruth LLP
7647 North Fresno Street
Fresno, CA 93720

Counsel for Petitioner
Fresno County
Superintendent of
Schools

QUESTIONS PRESENTED

1. The Equal Pay Act permits employers to pay men and women different wages for the same work "where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." 29 U.S.C. § 206(d)(1). Is prior salary a "factor other than sex"?

2. May deceased judges continue to participate in the determination of cases after their deaths?

PARTIES TO THE PROCEEDING

Petitioner is Jim Yovino, the current holder of the office of Fresno County Superintendent of Schools, the office that makes hiring decisions for those employed by the Superintendent's Office. Respondent is Aileen Rizo. These parties were the only parties in the Ninth Circuit below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT 3

REASONS FOR GRANTING THE PETITION 9

I. THIS COURT SHOULD DECIDE WHETHER EMPLOYERS MAY CONSIDER PRIOR SALARY 10

A. The circuits diverge on whether prior pay is a "factor other than sex." 10

B. This case is a good vehicle for resolving this important question 15

C. Prior Salary Is a "Factor Other Than Sex" under the Equal Pay Act 19

1. Prior salary is a factor other than sex 19

2. Arguments to the contrary are not persuasive 23

TABLE OF CONTENTS
(continued)

Page

II. THIS COURT COULD ALSO CLARIFY THE ADDITIONAL QUESTION WHETHER DECEASED JUDGES CAN DECIDE CASES 28

A. The Ninth Circuit's practice is impermissible 29

B. Courts take inconsistent approaches to counting the votes of deceased judges 30

C. The Court can consider this issue while simultaneously resolving the first question presented 32

CONCLUSION 33

APPENDIX A: Opinion of the Ninth Circuit (en banc) (April 9, 2018) 1a

APPENDIX B: Opinion of the Ninth Circuit (April 27, 2017) 52a

APPENDIX C: Opinion of the Eastern District of California (Dec. 18, 2015) 63a

APPENDIX D: Order of the Ninth Circuit Granting Rehearing en banc (April 9, 2018) 94a

APPENDIX E: Statutory Provisions (excerpts of 29 U.S.C. § 206) 95a

TABLE OF AUTHORITIES

Page(s)

CASES

Aldrich v. Randolph Cent. School Dist.,
963 F.2d 520 (2d Cir. 1992) 10, 11, 27, 28

Altera Corp. & Subsidiaries v. Comm'r of Internal Revenue,
— F.3d —, 2018 WL 3542989
(9th Cir. July 24, 2018) 32

Altera Corp. & subsidiaries v. Comm'r of Internal Revenue,
— F.3d —, 2018 WL 3734216
(9th Cir. Aug. 7, 2018) 32

Beck-Wilson v. Principi,
441 F.3d 353 (6th Cir. 2006) 11, 27, 28

Benner v. Porter,
9 How. (50 U.S.) 235 (1850) 30

Caudle v. Bristow Optical Co.,
224 F.3d 1014 (9th Cir. 2000) 31

Christie v. Comm'r of Soc. Sec. Admin.,
489 F. App'x 581 (3d Cir. 2012) 31

Corning Glass Works v. Brennan,
417 U.S. 188 (1974) 1

District of Columbia v. Wesby,
138 S. Ct. 577 (2018) 33

Glossip v. Gross,
135 S. Ct. 2726 (2015) 33

TABLE OF AUTHORITIES
(continued)

Page(s)

Gross v. FBL Fin. Servs., Inc.,
557 U.S. 167 (2009) 20

Hernandez v. Chappell,
878 F.3d 843 (9th Cir. 2017) 32

Irby v. Bittick,
44 F.3d 949 (11th Cir. 1995) 11, 12

J.W. Frellsen & Co. v. Crandell,
217 U.S. 71 (1910) 30, 31

Kouba v. Allstate Ins. Co.,
691 F.2d 873 (9th Cir. 1982) 6, 7

Lauderdale v. Ill. Dep't of Hum. Servs.,
876 F.3d 904 (7th Cir. 2017) 12

Ledbetter v. Goodyear Tire & Rubber Co.,
550 U.S. 618 (2007) 22

Mayor & City Council of Baltimore v. Mathews,
571 F.2d 1273 (4th Cir. 1978) 31

Plaut v. Spendthrift Farm, Inc.,
514 U.S. 211 (1995) 30

Riser v. QEP Energy,
776 F.3d 1191 (10th Cir. 2015) 11, 12

Rodriguez v. United States,
480 U.S. 522 (1987) 25, 26

Safeco Ins. Co. of Am. v. Burr,
551 U.S. 47 (2007) 20

TABLE OF AUTHORITIES
(continued)

Page(s)

Smith v. Pennywell,
— F. App'x —, 2018 WL 3454412
(9th Cir. July 18, 2018) 32

Taylor v. White,
321 F.3d 710 (8th Cir. 2003) 13, 14, 15

United States v. Am.-Foreign Steamship Corp.,
363 U.S. 685 (1960) 29, 30, 31

United States v. Shaw,
885 F.3d 1217 (9th Cir. 2018) 32

United States v. Woods,
159 F.3d 1132 (8th Cir. 1998) 31

Univ. of Tex. Sw. Med. Ctr. v. Nassar,
570 U.S. 338 (2013) 20

Washington Cty. v. Gunther,
452 U.S. 161 (1981) 1, 21, 22, 23

Wernsing v. Dep't of Human Servs., State of Illinois,
427 F.3d 466 (7th Cir. 2005) ..... *passim*

Wisconsin Cent. Ltd. v. United States,
138 S. Ct. 2067 (2018) 26

CONSTITUTIONAL AND STATUTORY AUTHORITIES

U.S. Const. art. III, § 1 30

28 U.S.C. § 46 ..... 3, 29

28 U.S.C. § 1254 ..... 2, 33

28 U.S.C. § 1292 33

TABLE OF AUTHORITIES
(continued)

Page(s)

28 U.S.C. § 1331 32

29 U.S.C. § 206 ..... *passim*

42 U.S.C. § 2000e-2 ..... 1, 6, 20

OTHER AUTHORITIES

House Comm. on Equal Pay Act of 1963, H.R.Rep. No. 88-309 (1963) 26

Roy Maurer, Soc'y for Hum. Res. Mgmt., *Employers Split on Asking About Salary History* (April 2, 2018) 17

NPR, *More Employers Avoid Legal Minefield by Not Asking About Pay History* (May 3, 2018) 19

Noam Scheiber, *If a Law Bars Asking Your Past Salary, Does It Help or Hurt?*, N.Y. Times (Feb. 16, 2018) 17

PETITION FOR A WRIT OF CERTIORARI

The Equal Pay Act requires "equal pay for equal work regardless of sex," subject to four exceptions. *Corning Glass Works v. Brennan*, 417 U.S. 188, 190 (1974). The fourth, catchall exception authorizes disparities based on "any other factor other than sex." 29 U.S.C. § 206(d)(1). Section 206(d)(1)'s defenses apply both to Equal Pay Act claims and to pay-based Title VII sex-discrimination claims. *See* 42 U.S.C. § 2000e-2(h); *Washington Cty. v. Gunther*, 452 U.S. 161, 168–70 (1981).

This petition asks whether prior salary is a factor other than sex. That question has badly divided the circuits. Two say that employers may rely on prior pay. By contrast, the Ninth Circuit held below that employers may never rely on prior pay. In the middle, four circuits allow employers to rely on prior pay in limited circumstances: two allow employers to use prior pay so long as they have a legitimate business reason for doing so, while two others allow employers to use prior pay provided that they do so along with another sex-neutral factor.

Confusion over this important question of law is unacceptable. This Court should grant certiorari and reverse the Ninth Circuit's incorrect view.

OPINIONS BELOW

The district court's amended and superseding opinion (Pet. App. 63a–93a) is unreported but available at 2015 WL 9260587. The Ninth Circuit's now-vacated panel decision (Pet. App. 52a–62a) is reported at 854 F.3d 1161. The en banc Ninth Circuit's decision (Pet. App. 1a–51a) is reported at 887 F.3d 453.

JURISDICTION

The en banc Ninth Circuit entered judgment on April 9, 2018. Justice Kennedy extended the time in which to petition for certiorari until August 23, 2018, and the Chief Justice further extended the time in which to petition for certiorari until September 4, 2018. Petitioner filed before that date. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Equal Pay Act, 29 U.S.C. § 206(d), provides:

(d) Prohibition of sex discrimination

> (1) No employer having employees subject to any provisions of this section shall discriminate ... between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

Section 46 of Title 28 dictates the composition of appellate panels. It provides:

> Cases and controversies shall be heard and determined by a court or panel of not more than three judges ..., unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 (92 Stat. 1633) ... .

STATEMENT

1. Between 1998 and 2015, the Fresno County Superintendent of Schools set new employees' salaries using their prior salaries. *See* Pet. App. 4a–5a; Excerpts of Record 538–39, *Rizo v. Yovino*, No. 16-15372 (9th Cir.) ("ER"). Under what came to be known as "Standard Operating Procedure 1440," the County Superintendent added five percent to each new employee's prior salary and, based on that figure, placed the employee on a corresponding "step" of the salary schedule. ER 534. The County Superintendent had good reasons for this policy: It ensured objectivity and consistency in pay decisions; it made favoritism impossible; it helped attract high-quality candidates by ensuring that new hires would get a raise if they accepted the County Superintendent's offer of employment; and it promoted the judicious use of public resources by curbing the prospect of overpaying in individual salary negotiations. ER 582.

The County Superintendent's policy applied to all employees. Take Jim Yovino, who now serves as Fresno County Superintendent of Schools. When he was hired as Deputy Superintendent in 2006, his starting salary was calculated by adding 5 percent to his prior salary and placing him in the corresponding step on the salary schedule for that position—Step 1, the lowest possible step. ER 581–82. His predecessor as Superintendent, Larry Powell, likewise started on Step 1 when he was hired as Deputy Superintendent in 2005. ER 584.

The policy did not favor either sex. In the decade after Yovino's hiring, the County Superintendent hired or promoted nine female administrators whom it placed on salary steps ***higher than*** Step 1, where Yovino began. The same is true for just three male administrators. ER 584. And throughout the policy's existence, the County Superintendent apparently deviated from it only once. When an employee in a 12-month position was promoted to an 11-month position, the County Superintendent placed him on Step 2 rather than Step 1 to avoid creating an annual salary loss for him. ER 535. (One female employee ***may have*** been placed on a step higher than she should have been, but her records were too incomplete to tell. ER 535.)

2. The County Superintendent applied the policy to Respondent Aileen Rizo when she was hired as a "math Consultant" in 2009. ER 212. Rizo had most recently worked as a middle school math teacher in Arizona. ER 268. In that position, she earned $50,630 for 206 days of work, plus a $1,200 stipend because she held a master's degree. ER 269. To her knowledge, "gender was [not] a factor in determin-

ing" her starting salary in that position, and she "assume[d]" that her salary there was based on sex-neutral factors such as "years of experience." ER 315–16.

Applying a five-percent raise to Rizo's daily rate left her below the low end of the County Superintendent's ten-step schedule for math consultants. *Id.* at 327. She thus started at Step 1, with an annual salary of $62,133 for 196 days of work and a $600 master's degree stipend. ER 231, 448; Pet. App. 4a–5a. That amounted to a raise of over twenty percent. ER 513.

3. Rizo realized her pay was lower than her colleagues' in 2012, when one mentioned that he had started at Step 9. ER 451. Rizo complained about the pay disparity to the County Superintendent's Human Resources department in August 2012. ER 535.

As explained, the County Superintendent had neutrally applied its policy to employees of both sexes for more than a decade when it hired Rizo. Indeed, one other female consultant had been hired at Step 8, a step higher than two male math consultants, and just one step below a fourth. ER 582–83, 565. Even though the Equal Pay Act does not create disparate-impact liability, the County Superintendent responded to Rizo's complaint to Human Resources by reviewing the initial salary placements of all management-level employees for sex-based disparities. According to its analysis, there were none; men and women shared the same average starting salaries. The County Superintendent repeated its analysis in 2013 and 2014, each time with the same result. ER 535–36. In 2012, both male and female consultants

had an average initial salary at Step 4; in 2013, the average initial salary for both was Step 5; and in 2014, it was again Step 4 for both sexes. ER 536.

Rizo sued Petitioner in state court, alleging that the County Superintendent's policy violated the Equal Pay Act, 29 U.S.C. § 206(d), Title VII, 42 U.S.C. § 2000e *et seq.*, and California state-law prohibitions on sex discrimination. Petitioner removed the case to federal court, and moved for summary judgment. Petitioner argued that the disparity arose based entirely on the policy's consideration of prior salary; that prior salary is a "factor other than sex," § 206(d)(1); and that any wage disparity based on that factor was therefore permitted by the Equal Pay Act.

The District Court denied Petitioner's motion, reasoning that "a pay structure based exclusively on prior wages is so inherently fraught with the risk—indeed here the virtual certainty—that it will perpetuate a discriminatory wage disparity between men and women that it cannot stand, even if motivated by a legitimate non-discriminatory business purpose." Pet. App. 84a–85a. Recognizing that its ruling implicated a circuit split and effectively resolved liability in Rizo's favor, the District Court certified its ruling for interlocutory appeal. Pet. App. 92a. The Ninth Circuit granted the petition for permission to file an interlocutory appeal. Pet. App. 54a.

4. A three-judge Ninth Circuit panel reversed. In *Kouba v. Allstate Insurance Co.*, the Ninth Circuit held that prior salary is a "factor other than sex"—and that employers may therefore consider it in setting wages—provided it is a reasonable means of ef-

fectuating some business policy. 691 F.2d 873, 875–77 (9th Cir. 1982). The panel held that *Kouba* applied equally to a case like Rizo's, where prior salary was the only factor used to justify a pay disparity. Pet. App. 59a. It thus remanded for the District Court to consider the reasonableness of the County Superintendent's business justifications for using its policy. Pet. App. 61a–62a.

Rizo sought and received en banc review. Pet. App. 94a. The en banc court unanimously rejected the panel decision, affirming the District Court's denial of summary judgment. Pet. App. 28a. But it divided 6-2-2-1 over the reasoning.

Judge Reinhardt, who died more than a week before the decision issued, wrote the majority opinion for himself and five others. According to a footnote, "[t]he majority opinion and all concurrences were final, and voting was completed by the en banc court prior to his death." Pet. App. 1a.

The majority held that, as "a general rule," prior pay cannot be a "factor other than sex." Pet. App. 12a. The court noted that the broad factor-other-than-sex exception in section 206(d)(1) follows three narrower exceptions, all of which "relate to job qualifications, performance, and/or experience." Pet. App. 13a. The majority concluded that the broad exception must be similarly limited, citing the *noscitur a sociis* and *ejusdem generis* canons. And because it determined that prior salary is "not a legitimate measure of work experience, ability, performance, or any other job-related quality," it held that prior salary does not qualify as a "factor other than sex." Pet. App. 25a. Any other conclusion, Judge Reinhardt reasoned, would be inconsistent with the Act's legis-

lative history, which he thought also showed Congress's desire to limit the catchall exception to "legitimate, job-related means of setting pay." Pet. App. 20a–21a.

The court acknowledged that it was parting ways with other circuits. It rejected the rule in the Second and Sixth Circuits—which allow employers to consider prior pay for "business-related" and "job-related" reasons—because allowing employers to consider such factors "would permit the use of far too many improper justifications for avoiding the strictures of the Act." Pet. App. 23a. It also criticized the position of the Tenth and Eleventh Circuits—that employers may consider prior pay, just not by itself—as a "distinction without reason." Pet. App. 27a. The majority then purported to reserve judgment on an unusual distinction of its own: using prior pay in "individualized salary negotiation[s]." Pet. App. 12a. It did not explain, however, why the analysis might differ in that scenario.

Five members of the court concurred only in the judgment. Judge McKeown, joined by Judge Murguia, would have held that prior salary cannot constitute the sole reason for a pay disparity between men and women, but may be considered as one of many factors. *See* Pet. App. 29a. Judge Callahan, joined by Judge Tallman, said that "'prior pay' is not inherently a reflection of gender discrimination," but that its use as the *sole* factor in determining salary should be "conclusively presumed to be gender based." Pet. App. 47a, 45a. Like Judges McKeown and Murguia, however, Judges Callahan and Tallman would have allowed the consideration of prior pay alongside other factors, so long as the employer

could show that any resulting differences in pay were not based on gender. Pet. App. 47a.

Judge Watford recognized that "past pay can constitute a 'factor other than sex'" under the Act. Pet. App. 49a. He reasoned, however, that "[i]f past pay ... reflect[s] sex discrimination, an employer cannot rely on it to justify a pay disparity, whether the employer considers past pay alone or in combination with other factors." *Id.* In Judge Watford's view, it will be very difficult for employers to prove that an employee's prior pay does not "reflect[] sex discrimination": because "gender pay disparities persist" across the economy, it "remains highly likely that a woman's past pay will reflect, at least in part, some form of sex discrimination." Pet. App. 51a. Because Petitioner did not show that Rizo's "sector of the American economy"—schoolteachers, apparently—was entirely free from sex discrimination, Judge Watford concurred in the judgment. *Id.*

This petition for certiorari followed.

REASONS FOR GRANTING THE PETITION

The circuits have widely diverged about whether prior salary is a "factor other than sex" for purposes of the Equal Pay Act. Below, the Ninth Circuit held that it never is. By contrast, the Seventh and Eighth Circuits allow employers to rely on prior salary. And while four other circuits also allow the use of prior pay, they do so in limited circumstances—two allow it only when the employer has a good business reason, and two allow it only when prior pay is used together with another factor to explain a wage disparity. There should not be disagreement on this important question of federal law.

This case—which turns on that question—is an ideal vehicle for resolving the dispute. It also affords the Court an opportunity to resolve another important question: whether a court may count the vote of a judge who died before the case was determined.

I. THIS COURT SHOULD DECIDE WHETHER EMPLOYERS MAY CONSIDER PRIOR SALARY.

A. The circuits diverge on whether prior pay is a "factor other than sex."

1. The decision below holds that, with the *possible* exception of salaries set through "individualized negotiation[s]," prior pay is never a "factor other than sex" under the Equal Pay Act. *E.g.*, Pet. App. 10a ("[B]y relying on prior salary, the County fails as a matter of law to set forth an affirmative defense."); Pet. App. 12a ("[P]rior salary is not a permissible 'factor other than sex' within the meaning of the Equal Pay Act."); Pet. App. 27a ("[I]t is impermissible to rely on prior salary to set initial wages."). The Ninth Circuit's rule is stated absolutely: whether "alone or in combination with other factors," prior pay never qualifies as a "factor other than sex" for purposes of the Equal Pay Act. Pet. App. 3a.

Four circuits have held that prior pay sometimes counts as a "factor other than sex" and sometimes does not. But the details necessary for deciding that issue vary by circuit. In the Second Circuit, "employers cannot meet their burden of proving that a factor-other-than-sex is responsible for a wage differential by asserting use of a gender-neutral" system—such as prior pay—"without more." *Aldrich v. Ran-*

dolph Cent. School Dist., 963 F.2d 520, 525 (2d Cir. 1992). But they may rely on prior pay (or another such wage-setting system) so long as they "prove[]" that the system "is rooted in legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue." *Id.* Thus, while the Second Circuit recognizes that a factor like prior pay is "literally *a* factor other than sex," an employer cannot rely on it unless the employer can convince a court after the fact that its use of prior pay "has some grounding in legitimate business considerations." *Id.* at 527.

The Sixth Circuit applies the same rule. "[T]he Equal Pay Act's exception ... does not include literally *any* other factor, but a factor that, at a minimum, was adopted for a legitimate business reason." *Beck-Wilson v. Principi*, 441 F.3d 353, 365 (6th Cir. 2006). So employers may not rely on a sex-neutral system (such as a system based on prior pay) to explain salary differentials unless they can identify court-approved "business-related" reasons for using that system. *Id.* at 366.

The Tenth and Eleventh Circuits have staked out yet another sometimes-you-can–sometimes-you-can't position, one that conflicts with both the Ninth Circuit and the Second and Sixth Circuits. They recognize that prior pay may qualify as a "factor other than sex." *See Riser v. QEP Energy*, 776 F.3d 1191, 1199 (10th Cir. 2015) ("[A]n individual's former salary can be considered in determining whether pay disparity is based on a factor other than sex."); *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995) ("This court has not held that prior salary can never be used by an employer to establish pay."). But each

prohibits employers from relying on prior pay *alone* to justify a wage disparity. *See Riser*, 776 F.3d at 1199 ("[T]he EPA precludes an employer from relying solely upon a prior salary to justify pay disparity."); *Irby*, 44 F.3d at 955 ("While an employer may not ... rest[] on prior pay alone, ... there is no prohibition on utilizing prior pay as part of a mixed-motive, such as prior pay *and* more experience."). Therefore: In the Ninth Circuit, prior pay may not be used "alone or in combination with other factors," Pet. App. 2a; in the Second and Sixth Circuits, prior pay alone might suffice, so long as the employer has a good reason for relying on it; but in the Tenth and Eleventh Circuits, prior pay may be used, though only together with other factors. And whereas the Ninth Circuit left for another day the question whether its rule would apply in the context of "individualized salary negotiation[s]," Pet. App. 12a, *none* of these other circuits have even suggested that this context could make any difference.

Finally, the Seventh and Eighth Circuits have held that employers may use prior pay, even by itself, and have ruled in favor of employers at summary judgment for that reason. As Judge Easterbrook succinctly explained, the Equal Pay Act "forbids differences 'on the basis of sex' rather than differences that have other origins." *Wernsing v. Dep't of Human Servs., State of Illinois*, 427 F.3d 466, 468 (7th Cir. 2005). Because "[w]ages at one's prior employer are a 'factor other than sex,'" "an employer may use them to set pay consistently with the Act." *Id.*; *see also Lauderdale v. Ill. Dep't of Hum. Servs.*, 876 F.3d 904, 908 (7th Cir. 2017) ("[T]his court has repeatedly held that a difference in pay based on the

difference in what employees were previously paid is a legitimate 'factor other than sex.'"). Judge Easterbrook also explained why, contrary to other circuits' views, "[s]ection 206(d) does not authorize federal courts to set their own standards of 'acceptable' business practices" by scrutinizing employers' reasons for relying on prior pay. 427 F.3d at 468. "The Equal Pay Act forbids sex discrimination, an intentional wrong." *Id.* at 469. Under such a regime, "the employer may act for any reason, good or bad," so long as its decision is not based on "the prohibited criteri[on]." *Id.* A decision based on prior pay—like the one in Wernsing's case—is not. *See id.* at 467–68.

The Eighth Circuit agrees. "On its face, the EPA does not suggest any limitations to the broad catch-all 'factor other than sex' affirmative defense." *Taylor v. White*, 321 F.3d 710, 717 (8th Cir. 2003). And "salary retention policies"—which may perpetuate preexisting salary disparities by basing employees' current salary on prior salaries for other positions—"are not necessarily gender biased." *Id.* at 718. Thus, where an employer has and neutrally applies a salary retention policy, the employer is entitled to the Equal Pay Act's factor-other-than-sex defense, regardless of the "wisdom or reasonableness" of the employer's decision to do so. *Id.* at 719; *see id.* at 720–23 (granting summary judgment because the employer applied its neutral policy).

Of course, the Seventh and Eighth Circuits have noted that simply *citing* prior pay does not end an Equal Pay Act case. *See Wernsing*, 427 F.3d at 470; *Taylor*, 321 F.3d at 718. That is because employers cannot use prior pay to cover up their *own* sex dis-

crimination; if prior pay is simply "a pretext for a decision really made on prohibited criteria," the employer remains liable. *Wernsing*, 427 F.3d at 469; *Taylor*, 321 F.3d at 716 (examining whether the Army deployed its policy "as a mere pretext to hide gender-based wage discrimination"). And dicta in *Wernsing* suggests that if a plaintiff proves that her own prior pay was itself discriminatory, it may not be used to justify a wage differential. 427 F.3d at 470. Because Petitioner indisputably relied in good faith upon Rizo's prior pay when setting her salary, and because Rizo herself had no reason to believe that her salary in her prior position resulted from sex discrimination, *see* ER 315–16, Petitioner could not be held liable in the Seventh and Eighth Circuits. *See Wernsing*, 427 F.3d at 470–71; *Taylor*, 321 F.3d at 720–23.

2. Rizo acknowledged this circuit split in her petition for rehearing en banc. There, she wrote that the Seventh and Eighth Circuits have "reject[ed] the claim that sole reliance on prior salary violates the Equal Pay Act," Rehearing Pet. 7 n.3, while the Tenth and Eleventh Circuits forbid employers from basing compensation "*solely* on ... new employees' prior wages for previous employers," *id.* at 1–2. The EEOC acknowledged the conflict in its briefing too. It urged the en banc court to adopt the Tenth and Eleventh Circuits' view that "prior pay alone cannot be considered a 'factor other than sex' within the meaning of the EPA." EEOC Rehearing Amicus 6. But it "recognize[d] that even if [the Ninth Circuit] adopt[ed]" that rule, doing so "w[ould] not entirely eliminate the circuit conflict" because "[t]he Seventh Circuit takes the position that 'prior wages are a 'fac-

tor other than sex.'" *Id.* at 12 (quoting *Wernsing*, 427 F.3d at 468).

The circuits themselves recognize their disagreement. The Ninth Circuit, for instance, expressly rejected the Seventh and Eighth Circuits' approach. *See* Pet. App. 21a & n.15; *see* Pet. App. 34a (McKeown, J., concurring) (the Seventh Circuit has "veered far off course"). It also rejected the Tenth and Eleventh Circuits' position, calling it a "distinction without reason." Pet. App. 27a. The other circuits have been similarly forthcoming. *See, e.g.*, *Taylor*, 321 F.3d at 720 (rejecting Eleventh Circuit's approach); *Wernsing*, 427 F.3d at 468 (rejecting the Second, Sixth, and Eleventh Circuit's approaches). This open split of authority will not resolve itself.

B. This case is a good vehicle for resolving this important question.

1. This case affords the Court an excellent opportunity to clear away the confusion. It is undisputed that, under the policy at issue, Rizo's pay—like her colleagues'—was "dictated" by her prior salary and her master's degree stipend. Pet. App. 4a–5a. And it is undisputed at this stage that the pay disparity is based only on her prior salary. Thus, whether prior pay qualifies as a factor other than sex will "resolve[] the issue of liability on [Rizo's] claims." Pet. App. 6a.

This case also highlights divergent answers to that question currently prevailing across the country. In the Ninth Circuit, Rizo is entitled to summary judgment as to liability. *See* Pet. App. 28a. The same would be true in the Tenth and Eleventh Circuits: because they prohibit employers from relying solely on prior pay, *see supra* 11–12, and because this case

has been litigated on the understanding that prior pay alone accounts for the disparity between Rizo's salary and her colleagues', Rizo would receive summary judgment in those circuits as well.

By contrast, Petitioner would have had a chance to prove his affirmative defense before a jury in the Second and Sixth Circuits. Petitioner gave business reasons for its policy: it avoids subjectivity and favoritism; encourages candidates to leave their present jobs; and saves taxpayer money. Pet. App. 58a. Under the Ninth Circuit's old rule—and under the Second and Sixth Circuits' current rule—those reasons were at least good enough to get to a jury, if not to absolve Petitioner without a trial. *See supra* 10–11; Pet. App. 61a–62a (vacating and remanding to consider these business justifications under *Kouba*).

And in the Seventh and Eighth Circuits, Petitioner would be entitled to summary judgment. Those circuits allow employers to rely on prior pay—at least so long as the plaintiff does not prove that the employer's actions are pretextual, or that her own prior salary was itself based on sex. *See supra* 12–13. There is no such proof here. Rizo admitted that *she* did not know whether her prior salary reflected sex discrimination, and she "assume[d]" that it reflected sex-neutral factors such as experience. ER 315–16. There is thus no reason to believe *Petitioner* knew that Rizo's salary embodied past discrimination and acted to reinforce that discrimination.

2. This split undermines the viability of a widespread employment practice. Employers often ask about and rely on prior pay in determining someone's salary. For instance, when "setting pay for internal candidates moving to new roles," one recent study of

compensation and benefits professionals at larger companies found that 89 percent of employers "rel[ied] on salary histories to evaluate a candidate's pay expectations," and 80 percent used that history "to determine what offer a candidate will find acceptable." Roy Maurer, Soc'y for Hum. Res. Mgmt., *Employers Split on Asking About Salary History*, (April 2, 2018), https://bit.ly/2naruoL. Employers also ask about and rely on prior pay when recruiting new employees. According to the same survey, nearly two-thirds of employers allow interviewers to ask about prior salary in jurisdictions that allow them to do so. *See id.*

This practice makes sense. Some employers—particularly smaller employers, those operating in niche markets, and those opening new positions—use prior salary "to determine how to pay fairly." Noam Scheiber, *If a Law Bars Asking Your Past Salary, Does It Help or Hurt?*, N.Y. Times (Feb. 16, 2018), https://nyti.ms/2C65i8H. Consider examples from the litigation surrounding Philadelphia's attempt to ban employers from asking about prior pay. Jacobsen Strategic Communications, for example, is a public relations company with roughly 30 employees. *See* Decl. of Susan Jacobsen, Dkt. 29-9, *Chamber of Commerce for Greater Phila. v. City of Philadelphia*, No. 2:17-cv-01548-MSG, ¶ 3 (E.D. Pa.). When it recruits candidates in new markets, it asks about and relies on prior pay to identify the prevailing local rates; as a small, growing business, it cannot afford to "pay for that analysis and research" from others. *Id.* ¶ 6(c). ESM Productions, a 20-person production company, faces related difficulties. There is "no fixed market for production crews"; prices instead "fluctu-

ate heavily based on the time of year and what other events are going on at the same time." Decl. of Christina Wong, Dkt. 29-15, in *Chamber*, ¶ 6. Here too, using prior salary makes sense because "the market price for a position is especially unclear." *Id.* ¶ 9. Employers in such situations often lack the resources to acquire in-depth studies of market rates (if such rates even exist), and use prior pay to solve the problem.

Larger companies confront similar issues. When Liberty Property Trust, a nationwide real estate company, created a new position of Vice President Program Manager, it was "unsure of the prevailing market wage" for positions like it. Decl. of Heidi Cunningham, Dkt. 29-6, in *Chamber*, ¶ 9(c). By asking about prior salary, Liberty realized that its proffered salary was below market rate and adjusted its offer. *Id.*

Employers put prior salary to other uses as well. Bittenbender Construction, for instance, operates in an industry where "all companies have essentially the same positions and titles." Decl. of Emily Bittenbender, Dkt. 29-3, in *Chamber*, ¶ 9(a). By asking about and relying on prior pay, Bittenbender can identify those candidates who, despite having the same job title and duties as everyone else, have a "high level of experience or skill" as reflected in their prior salary. *Id.* Other employers, such as the executive recruiting firm Diversified Search, ask about and rely on prior salary to trim the considerable costs associated with finding new hires, as employers do not want to waste their time or others' recruiting candidates whose prior salary makes it unlikely they will accept. *See* Decl. of Judith M. Von Seldeneck,

Dkt. 29-12, in *Chamber*, ¶ 7. Indeed, the reasons for using prior pay vary about as widely as the kinds of employers in the country. *See, e.g.*, Decl. of Keith S. DiMarino, Dkt. 29-7, in *Chamber*, ¶ 11(b) (DocuVault Delaware Valley uses prior commissions to gauge an applicant's sales ability, something "critical to [its] business model"); Decl. of Anna L. Mikson, Dkt. 29-10, in *Chamber*, ¶ 10(b) (FS Investments uses wage history to "craft[] a competitive and individualized compensation package" for "senior executive[]" candidates).

As it stands, though, companies are subject to a welter of different standards about the use of prior pay. In this setting, many must adopt whatever rule is most stringent; according to one survey, 46% "adopt policies to comply with the strictest laws in their region." NPR, *More Employers Avoid Legal Minefield by Not Asking About Pay History* (May 3, 2018), https://n.pr/2KCnec6. Because that rule is now the Ninth Circuit's total ban, many businesses must ignore prior salary entirely, lest it come back to haunt them in litigation in the country's most populous circuit. This Court, not that one, ought to determine the law on this issue nationwide.

C. Prior salary is a "factor other than sex" under the Equal Pay Act

In addition to deepening an entrenched, important circuit split, the Ninth Circuit wrongly limited employers' ability to rely on prior pay.

1. Prior salary is a factor other than sex.

The Equal Pay Act generally requires employers to pay equal wages for equal work; employers may not

"discriminate ... on the basis of sex by paying wages to employees ... at a rate less than the rate at which [they] pay[] wages to [similarly situated] employees of the opposite sex." 29 U.S.C. § 206(d)(1). But the Act allows such differentials where "such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." *Id.*; *see also* 42 U.S.C. § 2000e-2(h) (incorporating the Equal Pay Act's defenses into analogous Title VII claims).

The question here is whether a wage differential based on the employees' prior salaries is "a differential based on any other factor other than sex." To ask that question is to answer it. "In common talk, the phrase 'based on' indicates a but-for causal relationship and thus a necessary logical condition." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 63 (2007). It therefore "has the same meaning as the phrase 'because of.'" *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009). As this Court has explained, that phrase "mean[s] 'by reason of; on account of.'" *Id.*; *see also, e.g., Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 352 (2013) (Title VII's anti-retaliation provision "require[s] proof that the desire to retaliate was the but-for cause of the challenged employment action" because it makes it unlawful to take action against an employee "because" of his protected activities). Accordingly, a wage disparity is "based on" sex only if sex is "the 'reason' that the employer" paid male and female workers differently. *Gross*, 557 U.S. at 176. If the wage disparity stems from any other source, the employer is not liable; the disparity is based on a "factor other than sex."

A system that determines current pay based on prior pay is permissible under these straightforward provisions. By definition, the *reason* for wage disparities in such a system is the employees' wages in their former positions, not their sex. But as just explained, wage disparities justified on grounds *other* than sex are "based on any other factor other than sex" for purposes of the Act. Disparities based on prior pay thus fall outside the statute's reach.

This remains true even if, as the Ninth Circuit asserted, prior pay is correlated with sex—indeed, even if, *unlike* here, *supra* 3–6, it is directly correlated with sex in a particular case. Imagine a pharmaceutical company that pays more to sales reps with a B.S. in physics than to those with a B.A. in English—an indisputable "factor other than sex." Now suppose a male rep who studied Chaucer gets paid less than a woman who studied Newton. He might be able to show that, in fact, his pay was *affected* by sex; for instance, he could prove that his alma mater's science departments preferred female candidates and that this preference forced him into the humanities. But he cannot show that his pay was "based on" sex—it was "based on" educational attainment, a sex-neutral factor that does not transform into a sex-based one simply because the two are correlated. Only if the company used field of study as a *pretext* to pay male employees less would the Equal Pay Act intervene.

This textual conclusion derives additional strength from the Equal Pay Act's focus on discriminatory intent rather than disparate impact. The Equal Pay Act was "designed differently" than Title VII. *Gunther*, 452 U.S. at 170. Unlike that statute, Congress

"confine[d] [its] application" to disparate treatment—that is, "to wage differentials attributable to sex discrimination"—through the catchall defense. *Id.* at 170; *see id.* at 171 ("[C]ourts and administrative agencies are not permitted to substitute their judgment for the judgment of the employer ... who [has] established and applied a bona fide job rating system, so long as it does not discriminate on the basis of sex."). Of course, this is not to say that the Equal Pay Act mirrors Title VII's disparate-treatment provisions in every respect. Unlike a Title VII plaintiff, an Equal Pay Act plaintiff need not "pro[ve] ... intentional discrimination"; she can prevail if she proves a wage disparity and the employer provides no defense. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 640 (2007), *superseded by statute on other grounds*, Pub. L. No. 111-2 (2009). But once an employer invokes the Act's general defense, liability turns on whether the disparity is "based on" sex or something else, *see Gunther*, 452 U.S. at 170–71, the hallmark question of disparate-treatment liability.

An Equal Pay Act claim based on prior pay is, at best, a disguised disparate-impact claim. Indeed, the Ninth Circuit admitted as much. It rejected Petitioner's (and *Gunther*'s) explanation that the Equal Pay Act's catchall defense incorporates disparate-treatment principles. *See* Pet. App. 8a. And it grounded its rejection of prior pay as a "factor other than sex" in large part on the effects that using prior pay allegedly has on women. *See, e.g.*, Pet. App. 10a (prior pay "perpetuate[s] ... the pervasive discrimination at which the Act was aimed"); Pet. App. 27a ("perpetuates ... gender-based assumptions about the value of work"). But even if prior pay and sex corre-

lated perfectly, this reasoning would be mistaken. The Equal Pay Act does not cover "practices that are fair in form, but discriminatory in operation." *Gunther*, 452 U.S. at 170 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)). Instead, it attacks only "sex-based wage discrimination." *Id.* at 171.

2. Arguments to the contrary are not persuasive.

Under the Equal Pay Act's plain text, and in keeping with its status as an intentional discrimination provision, prior pay is thus a "factor other than sex." There are only two other possibilities. Prior salary might never be a "factor other than sex," as the Ninth Circuit held. Or, prior salary might sometimes, but not always, count as a "factor other than sex," as the Second, Sixth, Tenth, and Eleventh Circuits have held (in varying ways). Neither of these alternatives is correct.

The Ninth Circuit rule. Literally speaking, prior pay must be a "factor other than sex"; it is different than sex, and it is the basis for some employees' differential wages. To defend its contrary conclusion, then, the Ninth Circuit had to explain why "any ... factor other than sex" does not really mean "*any* ... factor other than sex." In its attempt to do so, the court reasoned that section 206(d)(1)'s specific exceptions—for "systems of seniority, merit, and productivity"—all "relate to job qualifications, performance, and/or experience." Pet. App. 13a. From that, it concluded that section 206(d)(1)'s "more general exception" should be similarly limited to cover only "legitimate measure[s] of work experience, ability, performance," and "other job-related qualit[ies]." Pet. App. 13a–14a, 25a (invoking the *noscitur a sociis* and

ejusdem generis canons); Pet. App. 14a–20a (discussing legislative history designed to prove the same point). Because the majority believed that prior salary "is not a legitimate measure of work experience, ability, performance, or any other job-related quality," it held that prior salary is not a "factor other than sex" as that phrase is properly construed. Pet. App. 25a.

That argument fails. *First*, in the context of section 206(d)(1)—a provision that forbids sex discrimination in the wage context—the most obvious common feature of the first three exceptions is that each is sex-neutral. Otherwise, they have little in common. (Merit-based systems and seniority-based systems, for example, are typically viewed as opposites.) Given that chief commonality, section 206(d)(1)'s catchall should be construed exactly as Petitioner and its plain language suggest: it should cover any factor that is sex-neutral, as prior salary is.

Second, even if the first three exceptions were each similarly related to "job qualifications, performance, and/or experience," that would not justify the Ninth Circuit's holding about prior salary. Prior salary *is* related to qualification, experience, and performance since more qualified, experienced, and high-performing employees tend to make more. Indeed, employers' actions demonstrate as much. If prior pay were as disconnected from qualifications, performance, and experience as the Ninth Circuit suggests, it would be remarkable that "many employers both public and private" give "lateral entrants a salary at least equal to what they had been earning." *Wernsing*, 427 F.3d at 467. So even if the Ninth Circuit were right to cabin "any other factor other than

sex" to those factors that meet these criteria, prior salary would comfortably qualify.

In addition to its erroneous textual reasoning, the Ninth Circuit relied heavily on what it regarded as the overarching purpose of the Equal Pay Act: "to put an end to historical wage discrimination against women." Pet. App. 11a. "At the time of the passage of the Act," the court reasoned, "an employee's prior pay would have reflected a discriminatory marketplace that valued the equal work of one sex over the other." Pet. App. 12a. Thus, "Congress simply could not have intended to allow employers to rely on these discriminatory wages as a justification for continuing to perpetuate wage differentials." *Id.* To effectuate that "clear intent and purpose," the Court refused to interpret the factor-other-than-sex provision to permit "setting employees' starting salaries on the basis of their prior pay." Pet. App. 11a.

The Ninth Circuit is wrong that, under Petitioner's view, employers setting salaries the day after the passage of the Act could have used discriminatory prior pay without fear of liability. As explained, employers may not use prior pay as a pretext for reinforcing discrimination, and there would have been *at least* a jury question about pretext in such circumstances.

Moreover, even if those employers might not be held liable, "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (per curiam). To the contrary, deciding which "competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent sim-

plistically to assume that whatever furthers the statute's primary objective must be the law." *Id.* at 526. When it came to the Equal Pay Act, Congress arrived at a legislative compromise that broadly permits disparate salaries so long as they are based on "*any* other factor other than sex." 42 U.S.C. § 206(d)(1) (emphasis added). Its reasons for doing so are irrelevant. As this Court explained just last Term, courts may not "rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have intended." *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2073 (2018) (internal quotation marks omitted).

In any event, the legislative history shows that Congress meant what it said when it exempted disparities based on "any ... factor other than sex." Per the House Committee Report:

> Three specific exceptions and one broad general exception are also listed. It is the intent of this committee that any discrimination based upon any of these exceptions shall be exempted from the operation of this statute. As it is impossible to list each and every exception, the broad general exclusion has also been included.

House Comm. on Equal Pay Act of 1963, H.R.Rep. No. 88-309 (1963), *reprinted in* 1963 U.S.C.C.A.N. 687, 689. Petitioner's reading fully accords with the House Committee's understanding that the factor-other-than-sex exclusion would constitute a "broad general exclusion."

Finally, the Ninth Circuit's reservation of the question whether "past salary may play a role in the course of an individualized salary negotiation," Pet.

App. 12a, transforms its analysis from misguided to inexplicable. Drawing that distinction would be inconsistent with everything else in the majority's opinion. If "prior salary" is not a "factor other than sex" because it does not "relate to job qualifications, performance, and/or experience," Pet. App. 13a, why would the negotiation context change anything? If prior salary is inherently a sex-based consideration, so that allowing employers to consider it would undermine Congress's goal of ending sex discrimination, how does it cease to be inherently sex-based during negotiations? And what in the statutory text or legislative history suggests that this distinction matters? These questions have no answers, which is perhaps why the Ninth Circuit did not give any. Nothing could logically stop the Ninth Circuit from expanding its already broad rule to individual negotiations, and there is no need to pretend otherwise. And even if the Ninth Circuit's rule were somehow kept from spreading to the context of individual negotiations, it would still be based on a misreading of the Equal Pay Act for all the reasons just discussed, and would still create a new branch in a deeply entrenched circuit split.

The Other Alternatives. In four other circuits, prior salary is sometimes, but not always, a "factor other than sex." These circuits have provided no good reason for their positions.

Consider first the circuits that allow the use of prior pay where the employer has "legitimate business reasons" for doing so. *Aldrich*, 963 F.2d at 526; *accord Beck-Wilson*, 441 F.3d at 365. These circuits defend their view on grounds much like the Ninth Circuit's—that the Act's "statutory history" suppos-

edly shows that "Congress intended for a job classification system to serve as a factor-other-than-sex defense ... only when the employer proves that the job classification system ... is rooted in legitimate business-related differences." *Aldrich*, 963 F.2d at 525; *see Beck-Wilson*, 441 F.3d at 365. These circuits are mistaken for the same reason as the Ninth Circuit: the Act's text and legislative history demonstrate that "any" means "any."

Nor is it coherent to hold that prior pay can be a factor other than sex only if it is used along with other factors. Prior salary either is or is not a "factor other than sex." Whether prior salary is considered together with other factors cannot affect that interpretive question. As the Ninth Circuit put it below, these courts have adopted a "distinction without reason," one that "cannot [be] reconcile[d] with the text or purpose of the Equal Pay Act." Pet. App. 27a.

* * *

There should be one, uniform answer to the important question whether the Equal Pay Act permits employers to base wages on prior pay. Because there is not, and because the Equal Pay Act permits employers to consider prior salary, this Court should grant certiorari and reverse the decision below.

II. THIS COURT COULD ALSO CLARIFY THE ADDITIONAL QUESTION WHETHER DECEASED JUDGES CAN DECIDE CASES.

This case also offers the Court a chance to provide guidance on another question: If a judge dies after argument but before the case is decided, may his vote continue to be counted?

A. The Ninth Circuit's practice is impermissible.

28 U.S.C. § 46 dictates the composition of appellate panels. It reads in relevant part:

> Cases and controversies shall be heard and determined by a court or panel of not more than three judges ... , unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 (92 Stat. 1633), except that any senior circuit judge of the circuit shall be eligible ... .

28 U.S.C. § 46(c).

The Court addressed this statute in *United States v. American-Foreign Steamship Corp.*, 363 U.S. 685 (1960). There, it held that the Second Circuit violated section 46(c) by permitting a judge who sat on the en banc panel but who retired before the decision to join an opinion. *See id.* at 686–87. At the time, the statute did not permit senior circuit judges to participate in en banc cases—it required that cases and controversies be "determined" by "active" circuit judges. *See* 28 U.S.C. § 46(c) (1958). The Court reasoned that a "case or controversy is 'determined' when it is decided." *American-Foreign*, 363 U.S. at 688. Since the retired judge ceased to be active upon his retirement, the case was decided with one non-active judge, thereby violating the statute.

This is an *a fortiori* case. When Judge Reinhardt died, he left "regular active service" as a federal judge. So when the Ninth Circuit "determined" this case or controversy, its en banc panel consisted of a judge not "in regular active service" or otherwise eligible to participate. Indeed, the facts here are more striking than in *American-Foreign*, because Judge Reinhardt (unlike the judge in *American-Foreign*) wrote the majority opinion.

In addition to this statutory problem, there is a constitutional one. Courts alone may exercise the "judicial Power" of the United States—the power to "render dispositive judgments." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995). Those courts are to be staffed with life-tenured judges appointed by the president and confirmed by the Senate. *See Benner v. Porter*, 9 How. (50 U.S.) 235, 244 (1850). These judges "shall hold their Offices *during good Behaviour*, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their *Continuance in Office*." U.S. Const. art. III, § 1 (emphasis added). The italicized phrases indicate what would anyway be obvious: Article III judges retain their power only during life. Upon death, they are no more an Article III judge than is any other non-Article III actor. By permitting these judges to participate in the determination of cases and controversies—by allowing those judges to share in the exercise of judicial power—the Ninth Circuit is violating Article III.

B. Courts take inconsistent approaches to counting the votes of deceased judges.

This Court does not count the votes of justices who pass away before a decision. *See, e.g., J.W. Frellsen*

& Co. v. Crandell, 217 U.S. 71, 75 (1910) ("This opinion, including the preliminary statement, was prepared by our Brother Brewer, and had been approved before his lamented death. *It was recirculated and again agreed to*, and is adopted as the opinion of the court." (emphasis added)). For example, this Court did not indicate Justice Scalia's vote in any decision published after his death.

At the appellate level, the only decision addressing the issue is *Mayor & City Council of Baltimore v. Mathews*, 571 F.2d 1273 (4th Cir. 1978) (per curiam). There, the Fourth Circuit held that it could not count the vote of a judge who died "before the dissenting and concurring opinions were written and before the court's decision was announced." *Id.* at 1276. Its reasoning is thin, and consists entirely of a "cf." citation to *American-Foreign*, apparently endorsing the analysis in the previous subsection.

The only other guidance comes from the courts' inconsistent practices. Lower courts faced with this situation sometimes draw a replacement judge for the panel. *See, e.g., Caudle v. Bristow Optical Co.*, 224 F.3d 1014, 1018 n* (9th Cir. 2000). Sometimes they decide the case with a two-judge quorum. *See, e.g., Christie v. Comm'r of Soc. Sec. Admin.*, 489 F. App'x 581, 582 n.* (3d Cir. 2012). But other times, they continue to count the vote cast before the judge's death. *See, e.g., United States v. Woods*, 159 F.3d 1132, 1133 n.1 (8th Cir. 1998) ("Judge Kelly died on October 21, 1998. This opinion is consistent with the vote he cast at conference on this case.").

Recently, the Ninth Circuit has embraced this last approach, albeit inconsistently. In at least two cases, it has counted the votes of a judge who died before

the decision was issued. *See, e.g.*, Pet. App. 1a; *Hernandez v. Chappell*, 878 F.3d 843, 845 n.** (9th Cir. 2017). In both, the deceased judge's vote was necessary to form the majority. Yet the Ninth Circuit has not recognized the votes of the same deceased judges when their votes were irrelevant to the outcome. *See, e.g.*, *Smith v. Pennywell*, — F. App'x —, 2018 WL 3454412, at *1 n.* (9th Cir. July 18, 2018); *United States v. Shaw*, 885 F.3d 1217, 1217 n.* (9th Cir. 2018). Even the Ninth Circuit's apparent practice of counting only dispositive votes is inconsistently applied; in *Altera Corp. & Subsidiaries v. Commissioner of Internal Revenue*, — F.3d —, 2018 WL 3542989, at *1 n.** (9th Cir. July 24, 2018), the court at first included the dispositive vote of Judge Reinhardt, who died four months earlier, before *sua sponte* substituting Judge Graber for Judge Reinhardt and withdrawing the opinion "to allow time for the reconstituted panel to confer," *Altera Corp. v. Comm'r of Internal Revenue*, — F.3d —, 2018 WL 3734216, at *1 (9th Cir. Aug. 7, 2018).

C. The Court can consider this issue while simultaneously resolving the first question presented.

The improper composition of the Ninth Circuit en banc panel creates no barrier to reaching the first question presented. The Court indisputably has jurisdiction to address it. For one thing, all parties here have Article III standing, since there remains an active dispute over Rizo's entitlement to relief under the Equal Pay Act. The federal courts have jurisdiction over this Equal Pay Act case under 28 U.S.C. § 1331. And while the Ninth Circuit was improperly constituted, it had jurisdiction to hear the

appeal under 28 U.S.C. § 1292(b). It issued a final judgment, and this court has jurisdiction to review that judgment under 28 U.S.C. § 1254(1).

So Judge Reinhardt's vote poses no vehicle problem. But it does allow the Court, if it chooses, to address two important issues at once, including one—the eligibility of deceased judges to participate in a decision—that arises only infrequently. Nothing prevents the Court from resolving both questions, which present independent grounds for reversal. *See, e.g.*, *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018) (holding that the D.C. Circuit erred both in finding a lack of probable cause and in denying qualified immunity); *Glossip v. Gross*, 135 S. Ct. 2726 (2015) (challenges to execution protocol failed for two independent reasons).

It would make particularly good sense to reach both questions here. The Ninth Circuit's judgment likely would not change after a remand for consideration by a properly staffed en banc court; the judgment against Petitioner was unanimous. And the first question involves an important, recurring issue in employment law, one that divided the circuits even before the Ninth Circuit intervened. The Court should eliminate that confusion even if it also prohibits deceased judges from determining pending cases.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

August 30, 2018

Respectfully submitted,

Benjamin M. Flowers
JONES DAY
325 John H. McConnell Blvd., Suite 600
Columbus, OH 43215

Elizabeth B. McRee
JONES DAY
77 West Wacker
Chicago, IL 60601

Michael G. Woods
Timothy J. Buchanan
MCCORMICK, BARSTOW, SHEPPARD, WAYTE & CARRUTH LLP
7647 North Fresno Street
Fresno, CA 93720

Shay Dvoretzky
Counsel of Record
Jeffrey R. Johnson
Cormac A. Early
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
Tel.: (202) 879-3939
sdvoretzky@jonesday.com

Counsel for Petitioner Fresno County Superintendent of Schools

APPENDIX

APPENDIX A

Aileen RIZO, Plaintiff-Appellee,

v.

Jim YOVINO, Fresno County Superintendent of Schools, Erroneously Sued Herein as Fresno County Office of Education, Defendant-Appellant.

No. 16-15372

United States Court of Appeals, Ninth Circuit.

Argued and Submitted *En Banc* December 12, 2017, San Francisco, California

Filed April 9, 2018

Appeal from the United States District Court for the Eastern District of California, Michael J. Seng, Magistrate Judge, Presiding, D.C. No. 1:14-cv-00423-MJS

Before: Sidney R. Thomas, Chief Judge, and Stephen Reinhardt*, M. Margaret McKeown, William A. Fletcher, Richard A. Paez, Marsha S. Berzon,

* Prior to his death, Judge Reinhardt fully participated in this case and authored this opinion. The majority opinion and all concurrences were final, and voting was completed by the en banc court prior to his death.

Richard C. Tallman, Consuelo M. Callahan, Mary H. Murguia, Morgan Christen and Paul J. Watford, Circuit Judges.

OPINION

REINHARDT, Circuit Judge:

The Equal Pay Act stands for a principle as simple as it is just: men and women should receive equal pay for equal work regardless of sex. The question before us is also simple: can an employer justify a wage differential between male and female employees by relying on prior salary? Based on the text, history, and purpose of the Equal Pay Act, the answer is clear: No. Congress recognized in 1963 that the Equal Pay Act was long overdue: "Justice and fair play speak so eloquently [on] behalf of the equal pay for women bill that it seems unnecessary to belabor the point. We can only marvel that it has taken us so long to recognize the fact that equity and economic soundness support this legislation."[1] Salaries speak louder than words, however. Although the Act has prohibited sex-based wage discrimination for more than fifty years, the financial exploitation of working women embodied by the gender pay gap continues to be an embarrassing reality of our economy.

Prior to this decision, our law was unclear whether an employer could consider prior salary, either alone or in combination with other factors, when setting its employees' salaries. We took this case en banc in order to clarify the law, and we now hold that prior salary alone or in combination with other factors cannot justify a wage differential. To hold otherwise—to

---

[1] 109 Cong. Rec. 8916 (1963) (statement of Sen. Hart).

allow employers to capitalize on the persistence of the wage gap and perpetuate that gap ad infinitum—would be contrary to the text and history of the Equal Pay Act, and would vitiate the very purpose for which the Act stands.

Fresno County Office of Education ("the County")[2] does not dispute that it pays Aileen Rizo ("Rizo") less than comparable male employees for the same work. However, it argues that this wage differential is lawful under the Equal Pay Act. In relevant part, the Act provides,

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) ***a differential based on any other factor other than sex.***

29 U.S.C. § 206(d)(1) (emphasis added). The County contends that that the wage differential is based on the fourth exception—the catchall exception: a "factor

---

[2] The defendant is Jim Yovino, the Superintendent of the Fresno County Office of Education. Because he is sued in his official capacity, we refer to the defendant as the County.

other than sex." It argues that an employee's prior salary can constitute a "factor other than sex" within the meaning of the catch all exception. However, this would allow the County to defend a sex based salary differential on the basis of the very sex-based salary differentials the Equal Pay Act was designed to cure. Because we conclude that prior salary does not constitute a "factor other than sex," the County fails as a matter of law to set forth an affirmative defense. We affirm the district court's denial of summary judgment to the County and remand for proceedings consistent with this opinion.[3]

Background

Aileen Rizo was hired as a math consultant by the Fresno County Office of Education in October 2009. Previously, she was employed in Maricopa County, Arizona as a middle and high school math teacher. In her prior position, Rizo earned an annual salary of $50,630 for 206 working days. She also received an educational stipend of $1,200 per year for her master's degrees in educational technology and mathematics education.

Rizo's new salary upon joining the County was determined in accordance with the County's Standard Operating Procedure 1440 ("SOP 1440"), informally adopted in 1998 and formally adopted in 2004. The

---

[3] We leave to the district court the question whether Rizo is entitled to summary judgment on her Equal Pay Act claim. *See Albino v. Baca*, 747 F.3d 1162, 1176 (9th Cir. 2014) (*en banc*) ("We have long recognized that, where the party moving for summary judgment has had a full and fair opportunity to prove its case, but has not succeeded in doing so, a court may enter summary judgment sua sponte for the nonmoving party.").

County's hiring schedule consists of 10 stepped salary levels, each level containing 10 salary steps within it. SOP 1440 dictates that a new hire's salary is to be determined by taking the hired individual's prior salary, adding 5%, and placing the new employee on the corresponding step of the salary schedule. Unlike the County's previous hiring schedule, SOP 1440 does not rely on experience to set an employee's initial salary. SOP 1440 dictated that Rizo be placed at step 1 of level 1 of the hiring schedule, corresponding to a salary of $62,133 for 196 days of work plus a master's degree stipend of $600.

During a lunch with colleagues in 2012, Rizo learned that her male colleagues had been subsequently hired as math consultants at higher salary steps. In August 2012, she filed a complaint about the pay disparity with the County, which responded that all salaries had been set in accordance with SOP 1440. The County claimed to have reviewed salary-step placements of male and female management employees for the past 25 years (so including before the policy was even informally adopted), finding that SOP 1440 placed more women at higher compensation steps than males. Rizo disputes this analysis and claims that the data show men were placed at a higher average salary step.

Rizo sued Jim Yovino in his official capacity as the Superintendent of the Fresno County Office of Education in February 2014. She claimed a violation of the Equal Pay Act, 29 U.S.C. § 206(d); sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"); sex discrimination under California Government Code § 12940(a); and failure to prevent discrimination

under California Government Code § 12940(k). *Rizo v. Yovino*, No. 1:14-cv-0423-MJS, 2015 WL 9260587, at *1 (E.D. Cal. Dec. 18, 2015), *vacated*, 854 F.3d 1161 (9th Cir.), *reh'g en banc granted*, 869 F.3d 1004 (9th Cir. 2017).

In June 2015, the County moved for summary judgment. It asserted that, although Rizo was paid less than her male counterparts for the same work, the discrepancy was based on Rizo's prior salary. The County contended that her prior salary was a permissible affirmative defense to her concededly lower salary than her male counterparts under the fourth, catchall clause, a "factor other than sex." *Rizo*, 2015 WL 9260587, at *7. The district court denied summary judgment, reasoning that SOP 1440 "necessarily and unavoidably conflicts with the EPA" because "a pay structure based exclusively on prior wages is so inherently fraught with the risk— indeed, here, the virtual certainty—that it will perpetuate a discriminatory wage disparity between men and women that it cannot stand." *Id.* at *9. It certified the legal question for interlocutory appeal, recognizing that denying summary judgment for the County "effectively resolves the issue of liability on Plaintiff's claims in her favor." *Id.* at *12.[4]

This Court granted the County's petition for permission to file an interlocutory appeal. The three-judge panel vacated the denial of summary judgment and remanded. *Rizo v. Yovino*, 854 F.3d 1161, 1167

---

[4] The certified question was "whether, as a matter of law under the EPA, 29 U.S.C. § 206(d), an employer subject to the EPA may rely on prior salary alone when setting an employee's starting salary." *Id.* at *13.

(9th Cir.), *reh'g en banc granted*, 869 F.3d 1004 (9th Cir. 2017). The panel concluded that *Kouba v. Allstate Insurance Co.*, 691 F.2d 873 (9th Cir. 1982) was controlling and that it permits prior salary alone to constitute a "factor other than sex" under the Equal Pay Act. In *Kouba*, the employer considered prior salary along with other factors, "including 'ability, education, [and] experience,'" in setting employees' salaries. *Rizo*, 854 F.3d at 1166 (quoting *Kouba*, 691 F.2d at 874). The panel concluded, however, that because *Kouba* "did not attribute any significance to Allstate's use of these other factors," that case permits consideration of prior salary alone, as long as use of that factor "was reasonable and effectuated some business policy." *Id.* Because it believed it was compelled to follow *Kouba*, the panel directed the district court on remand to consider the reasonableness of the County's proffered business reasons for its reliance on prior salary.

We granted the petition for rehearing *en banc* in order to clarify the law, including the vitality and effect of *Kouba*.

Standard of Review

We review the district court's denial of summary judgment *de novo*. *Diaz v. Eagle Produce Ltd. P'ship*, 521 F.3d 1201, 1207 (9th Cir. 2008). Summary judgment is available only when there are no genuine disputes of material fact and the movant is entitled to judgment as a matter of law. *Id.*

Discussion

Congress enacted the Equal Pay Act in 1963 to put an end to the "serious and endemic problem of employment discrimination in private industry" and to

carry out a broad mandate of equal pay for equal work regardless of sex. *Corning Glass Works v. Brennan*, 417 U.S. 188, 195, 94 S.Ct. 2223 (1974). It set forth a simple structure to carry out this simple principle. *See* 29 U.S.C. § 206(d)(1). A plaintiff must show that her employer has paid male and female employees different wages for substantially equal work. Not all differentials in pay for equal work violate the Equal Pay Act, however. The Act includes four statutory exceptions—"(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex"—which operate as affirmative defenses. *Id.*; *Corning*, 417 U.S. at 196, 94 S.Ct. 2223; *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir. 1986). "[A]n employer [must] submit evidence from which a reasonable factfinder *could* conclude not simply that the employer's proffered reasons *could* explain the wage disparity, but that the proffered reasons do in *fact* explain the wage disparity." *EEOC v. Md. Ins. Admin.*, 879 F.3d 114, 121 (4th Cir. 2018) (first citing *Stanziale v. Jargowsky*, 200 F.3d 101, 107–08 (3d Cir. 2000); and then citing *Mickelson v. N.Y. Life Ins. Co.*, 460 F.3d 1304, 1312 (10th Cir. 2006)); *see also* 29 U.S.C. § 206(d)(1) (exempting from liability wage differentials only where payment of which was "*made pursuant to*" an enumerated exception (emphasis added)).

The Equal Pay Act "creates a type of strict liability" for employers who pay men and women different wages for the same work: once a plaintiff demonstrates a wage disparity, she is *not* required to prove discriminatory intent. *Maxwell*, 803 F.2d at 446 (quoting *Strecker v. Grand Forks Cty. Social Serv. Bd.*,

640 F.2d 96, 99 n.1 (8th Cir. 1980) (en banc)). The County and Amicus Center for Workplace Compliance contend that the Supreme Court in *Washington County v. Gunther*, 452 U.S. 161, 101 S.Ct. 2242, 68 L.Ed.2d 751 (1981), infused into Equal Pay Act law Title VII's disparate treatment analysis. This is clearly wrong. In *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, the Supreme Court stated, "the EPA does not require...proof of intentional discrimination." 550 U.S. 618, 641, 127 S.Ct. 2162, 167 L.Ed.2d 982 (2007).[5] More recently, the Fourth Circuit reaffirmed that "[a]n EPA plaintiff need not prove that the employer acted with discriminatory intent to obtain a remedy under the statute." *Md. Ins. Admin.*, 879 F.3d at 120 (collecting cases). Accordingly, pretext as it is understood in the Title VII context plays no role in Equal Pay Act claims.[6]

Here, the County does not dispute that Rizo established a prima facie case and that none of the three specific statutory exceptions applies. The County urges instead that the fourth catchall exception, "any other factor other than sex," includes an employee's prior salary and applies when her starting salary is based on her prior salary. It

---

[5] *Superseded on other grounds by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

[6] Because the issue in this case is one of law, we do not have occasion to address the burden-shifting framework applicable to Equal Pay Act as opposed to Title VII claims. *Maryland Insurance Administration*, however, sets forth the standards to apply when there are factual, rather than legal, disputes. *Id.* at 120 21, 120 n.6, 120 n.7.

acknowledges that if it is wrong, it has no defense to Rizo's Equal Pay Act claim.

The question in this case is the meaning of the catchall exception. This is purely a question of law. We conclude, unhesitatingly, that "any other factor other than sex" is limited to legitimate, job-related factors such as a prospective employee's experience, educational background, ability, or prior job performance. It is inconceivable that Congress, in an Act the primary purpose of which was to eliminate long-existing "endemic" sex-based wage disparities, would create an exception for basing new hires' salaries on those very disparities—disparities that Congress declared are not only related to sex but caused by sex. To accept the County's argument would be to perpetuate rather than eliminate the pervasive discrimination at which the Act was aimed. As explained later in this opinion, the language, legislative history, and purpose of the Act make it clear that Congress was not so benighted. Prior salary, whether considered alone or with other factors, is not job related and thus does not fall within an exception to the Act that allows employers to pay disparate wages. Reflecting the very essence of the Act, we hold that by relying on prior salary, the County fails as a matter of law to set forth an affirmative defense.

A.

Allowing an employer to justify a wage differential between men and women on the basis of prior salary is wholly inconsistent with the provisions of the Equal

Pay Act.[7] As the Supreme Court has emphasized, "[t]he Equal Pay Act is broadly remedial, and it should be construed and applied so as to fulfill the underlying purposes which Congress sought to achieve." *Corning*, 417 U.S. at 208, 94 S.Ct. 2223. The remedial purpose of the Act is clear: to put an end to historical wage discrimination against women. Representative Florence Dwyer said in support of the bill: "The issue here is really a very simple one—the *elimination* of one of the most persistent and obnoxious forms of discrimination which is still practiced in this enlightened society."[8] Representative Harold Donohue in his comments on the bill stressed a similar point: "[T]his measure represents the *correction* of basic injustice being visited upon women in many fields of endeavor. . . ."[9] In other words, the Equal Pay Act was not intended to be a passive measure but a proactive one designed to correct salary structures based on the "outmoded belief" that women should be paid less than men. *See Corning*, 417 U.S. at 195, 94 S.Ct. 2223 (quoting S. Rep. No. 88-176, at 1 (1963)).

In light of the clear intent and purpose of the Equal Pay Act, it is equally clear that we cannot construe the catchall exception as justifying setting employees' starting salaries on the basis of their prior pay. At the

---

[7] This case arose in the context of initial wage-setting. By failing to address compensation for employees seeking promotions or changes in status within the same organization, we do not imply that the Equal Pay Act is inapplicable to these situations.

[8] 109 Cong. Rec. 9200 (1963) (statement of Rep. Dwyer) (emphasis added).

[9] *Id.* at 9212 (statement of Rep. Donohue) (emphasis added).

time of the passage of the Act, an employee's prior pay would have reflected a discriminatory marketplace that valued the equal work of one sex over the other. Congress simply could not have intended to allow employers to rely on these discriminatory wages as a justification for continuing to perpetuate wage differentials.

Today we express a general rule and do not attempt to resolve its applications under all circumstances. We do not decide, for example, whether or under what circumstances, past salary may play a role in the course of an individualized salary negotiation. We prefer to reserve all questions relating to individualized negotiations for decision in subsequent cases. Our opinion should in no way be taken as barring or posing any obstacle to whatever resolution future panels may reach regarding questions relating to such negotiations.[10]

B.

Basic principles of statutory interpretation also establish that prior salary is not a permissible "factor other than sex" within the meaning of the Equal Pay Act. The County maintains that the catchall exception unambiguously provides that any facially neutral factor constitutes an affirmative defense to liability under the Equal Pay Act. It is incorrect. The Supreme Court in *Corning* did not find the Act clear on its face. Rather, that decision applied an analytical framework similar to the one we use here by looking to the history of the legislative process of the Equal Pay Act as well

---

[10] Accordingly, Judge McKeown's and Judge Callahan's complaints regarding our opinion's effect upon the setting of pay on an individualized basis are meritless.

as the context in which the Act was adopted. 417 U.S. at 198–203, 94 S.Ct. 2223. Following a similar method of analysis, it is clear that when the catchall exception is read in light of its surrounding context and legislative history, a legitimate "factor other than sex" must be job related and that prior salary cannot justify paying one gender less if equal work is performed.

1.

The Act "establishes four exceptions—three specific and one a general catchall provision." *Corning*, 417 U.S. at 196, 94 S.Ct. 2223. Where, as here, a statute contains a catchall term at the end of a list, we rely on the related principles of *noscitur a sociis* and *ejusdem generis* to "cabin the contextual meaning" of the term, and to "avoid ascribing to [that term] a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." *Yates v. United States*, —— U.S. ——, 135 S.Ct. 1074, 1085–86, 191 L.Ed.2d 64 (2015) (plurality opinion) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995)); *id.* at 1089 (Alito, J., concurring in judgment) (applying *noscitur a sociis* and *ejusdem generis*).

The canon *noscitur a sociis*—"a word is known by the company it keeps"— provides that words grouped together should be given related meaning. *Id.* at 1085 (plurality opinion). Here, the catchall phrase is grouped with three specific exceptions based on systems of seniority, merit, and productivity. These specific systems share more in common than mere gender neutrality; all three relate to job qualifications, performance, and/or experience. It follows that the

more general exception should be limited to legitimate, job-related reasons as well.

A related canon, *ejusdem generis*, likewise supports our interpretation of the catchall term. We apply this canon when interpreting general terms at the end of a list of more specific ones. *Id.* at 1086. In such a case, "the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109, 114–15, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001) (quoting 2A Norman J. Singer, *Sutherland on Statutes and Statutory Construction* § 47.17 (1991)). The inclusion of the word "other" before the general provision in the Equal Pay Act makes its meaning all the more clear: "[T]he principle of *ejusdem generis* . . . implies the addition of *similar* after the word *other*." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 199 (2012). Here, we read the statutory exceptions as: "(i) a seniority system, (ii) a merit system, (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other [*similar*] factor other than sex." 29 U.S.C. § 206(d)(1). A similar factor would have to be one similar to the other legitimate, job-related reasons.

The presence of the word "any"—which the County contends indicates the expansive reach of the fourth statutory exception—does not counsel against our interpretation. In *Circuit City Stores*, for example, the Supreme Court interpreted § 1 of the Federal Arbitration Act, which lists "seamen, railroad employees, or *any other* class of workers engaged in foreign or interstate commerce" to include only

transportation workers, not workers in literally any industry. 532 U.S. at 109, 114–15, 121 S.Ct. 1302 (emphasis added) (quoting 9 U.S.C. § 1); *see also, e.g., In re Indian Gaming Related Cases*, 331 F.3d 1094, 1113–14 (9th Cir. 2003) (adopting district court's use of *ejusdem generis* to interpret the phrase "any other purposes specified by the legislature" as being limited to purposes directly related to gaming).

2.

Although "the authoritative statement is the statutory text," the legislative history of the Equal Pay Act further supports our interpretation that the catchall exception is limited to job-related factors. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005). "[T]he way in which Congress arrived at the statutory language" can provide "a better understanding of the [statutory] phrase" in question than "trying to reconcile or establish preferences between the conflicting interpretations of the Act by individual legislators or the committee reports." *Corning*, 417 U.S. at 198, 94 S.Ct. 2223. In *Corning*, the Supreme Court relied heavily on the history of the legislative process in interpreting the term "similar working conditions," a factor in determining whether employees perform "equal work" under the Equal Pay Act. *Id.* at 199–201, 94 S.Ct. 2223. The Court explained that "[a]s originally introduced," the Equal Pay bills considered in the House and Senate "required equal pay for 'equal work on jobs the performance of which requires equal skills'" and included "only two exceptions—for differentials 'made pursuant to a seniority or merit increase system which does not discriminate on the basis of sex.'" *Id.* at 199,

94 S.Ct. 2223; S. 882, 88th Cong. § 4 (1963); S. 910, 88th Cong. § 4(a) (1963); H.R. 3861, 88th Cong. § 4(a) (1963); H.R. 4269, 88th Cong. § 4(a) (1963). Industry representatives during the House and Senate hearings were "highly critical of the Act's definition of equal work and of its exemptions." *Corning*, 417 U.S. at 199, 94 S.Ct. 2223. The *Corning* Court compared the original language in the House and Senate bills to that in the final Act and thought "it plain that in amending the bill's definition of equal work to its present form, the Congress acted in direct response to these pleas" for a more definite standard for equal work based on bona fide job evaluation plans. *Id.* at 200, 94 S.Ct. 2223. The Court then used that context to interpret "similar working conditions." *Id.* at 200–01, 94 S.Ct. 2223.

We, too, look to the history of the legislative process and draw a similar conclusion that the inclusion of the catchall provision in the final bill was in direct response to the entreaties of industry witnesses. Industry representatives testified at the congressional subcommittee hearings that the two exceptions in the bills that had been introduced in the House and Senate were too specific and under inclusive, and "evidence[d] . . . a lack of understanding of industrial reality." *Equal Pay Act: Hearings Before the H. Special Subcomm. on Labor of the H. Comm. on Educ. & Labor on H.R. 3861, 4269, and Related Bills*, 88th Cong. 135 (1963) [hereinafter *House Hearing*] (statement of the American Retail Federation). The witnesses were concerned that companies would no longer be able to rely on the wide variety of factors used across industries to measure the value of a particular job. Accordingly, the witnesses proposed a

series of job-related exceptions in addition to the two original exceptions that had covered only seniority and merit systems.

Chief among those was an exception for job classification programs. The Vice President of Owens-Illinois Glass Co. testified: "Job classification and wage incentive programs are so widely accepted...in American industry that there seems little need to set forth a lengthy list of reasons why they should be excepted from the present bill." *Id.* at 101 (statement of W. Boyd Owen, Vice President of Personnel Administration, Owens-Illinois Glass Co.). Bona fide job classification programs were necessarily job related because they were used to "establish relative job worth" in diverse industries, "each [of which] has its own peculiarities and its own customs." *Id.* at 238 (statement of E.G. Hester, Director of Industrial Relations Research, Corning Glass Works). Using factors like skill and responsibility, these classification programs were "a yardstick against which [employers] can measure work performance and consequently pay." *Id.* at 146 (statement of John G. Wayman, Partner, Reed, Smith, Shaw & McClay). The Owens-Illinois Glass representative, Mr. Owen, explained that his proposed exceptions based on job classification and wage incentive programs would "merely parallel" the existing exceptions for seniority and merit systems, *id.* at 101, both of which were themselves job related.

Most of the other exceptions urged by industry witnesses were also job related. Mr. Owen, for example, explained that there are "countless reasons for wage variations . . . which are not discriminatory in nature," including differences in "the shift or time

of day worked, in the regularity of performing duties, [and] in training." *Id.* at 100. The statement of the American Retail Federation likewise explained: "It is a wholly justifiable fact that in retailing there are many situations where there are differentials in wage scales based on experience, hours worked (day or evening), job hazards, physical requirements, and the like." *Id.* at 135.

We think it plain that the catchall exception was added to the final Equal Pay Act in direct response to these employers' concerns that their legitimate, job-related means of setting pay would not be covered under the two exceptions already included in the bill.[11] Following the hearings, Representative Edith Green introduced H.R. 6060, which added the exceptions for "a differential based on any other factor other than sex" as well as "a system which measures earnings by quantity or quality of production." H.R. 6060, 88th Cong. § 2(d)(1) (1963). In its report discussing H.R. 6060, the House Committee explained that "a bona fide job classification program that does not discriminate on the basis of sex will serve as a valid defense to a charge of discrimination." H.R. Rep. No.

---

[11] While the third exception under the Equal Pay Act—"a system which measures earnings by quantity or quality of production"—is not at issue in this case, we note that this exception was also added following the hearings and that the exception roughly corresponds to the "wage incentive programs" discussed by the Owens-Illinois Glass representative. *See House Hearing* at 99, 101 (statement of W. Boyd Owen, Vice President, Owens-Illinois Glass Co.); *Equal Pay Act of 1963: Hearings Before the S. Subcomm. on Labor of the S. Comm. on Labor & Pub. Welfare on S. 882 and S. 910*, 88th Cong. 138 (1963) (statement of W. Boyd Owen, Vice President of Personnel Administration, Owens-Illinois Glass Co.).

88-309, at 3 (1963), *as reprinted in* 1963 U.S.C.C.A.N. 687, 689. The Committee also provided an illustrative list of other factors in addition to job classification programs which would be covered under the fourth exception, the catchall provision: "[A]mong other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability would also be excluded." *Id.* In the end, Representative Robert Griffin, author of the Landrum-Griffin Act, the landmark labor relations legislation, put it best. Describing the catchall exception, he said, "Roman numeral iv is a broad principle, and those preceding it are really examples."[12]

The Senate Committee Report likewise confirms that Congress intended the catchall exception to cover factors other than sex only insofar as they were job related. Following the hearings, Senator Patrick McNamara introduced S. 1409, which removed reference to seniority and merit systems and instead included just one statutory exception that was virtually identical to the Act's catchall exception. S. 1409, 88th Cong. § 2(d)(1) (1963). That exception read, "except where such a wage differential is based on any factor or factors other than sex." *Id.* In its report, the Senate Committee provided illustrative examples of what this general exception would cover: "seniority systems . . . based on tenure," "merit system[s]," "piecework system[s] which measure[ ] either the quantity or quality of production or performance," and "[w]ithout question," "other valid classification

---

[12] 109 Cong. Rec. 9203 (1963) (statement of Rep. Griffin).

programs. . . ." S. Rep. No. 88-176, at 4 (1963). Ultimately, the House version of the bill prevailed, with the House passing H.R. 6060 on May 23, 1963, *see* 109 Cong. Rec. 9217, and the Senate agreeing by a voice vote to the House amendments on May 28, 1963, see *id.* at 9761–62. In other words, the Senate contemplated from the start that the factors ultimately exempted by the House bill would be covered by a catchall provision identical in substance to the fourth exception and that it would cover only job-related factors.

Contrary to the County's assertion, *Washington County v. Gunther*, 452 U.S. 161, 101 S.Ct. 2242 (1981), supports the concept of a catchall provision limited to job-related factors. The Court commented in *Gunther* that "courts and administrative agencies are not permitted to 'substitute their judgment for the judgment of the employer . . who [has] established and applied a bona fide job rating system . . . .'"[13] The predicate for this dictum is that the employer must both establish a bona fide work-related system and apply it in good faith. The Court went on to reiterate its earlier conclusion in *Corning* that "the Equal Pay bill [was] amended . . . to add the fourth affirmative defense because of a concern that bona fide job-evaluation systems used by American businesses would otherwise be disrupted." *Id.* at 170 n.11, 101 S.Ct. 2242 (citing *Corning*, 417 U.S. at 199–201, 94 S.Ct. 2223). In sum, so long as the employer proves that it is using a bona fide job classification system or otherwise relying on bona fide job related factors to set

---

[13] 452 U.S. at 171, 101 S.Ct. 2242 (alterations in the original) (quoting 109 Cong. Rec. 9209 (1963) (statement of Rep. Goodell)).

pay, courts will not second guess the merits of the particular method used. Courts have followed the *Gunther* mandate. They have not held, for example, that it would be more appropriate to value educational background over years of experience when setting salaries or that job training should outweigh demonstrated ability to do the job. *Gunther* thus implicitly endorsed the bargain struck in the Equal Pay Act: employers may continue to use their legitimate, job-related means of setting pay but may not use sex directly or indirectly as a basis for establishing employees' wages.[14]

3.

We are not the only federal court of appeals to construe the catchall exception as limited to job-related factors.[15] The Eleventh Circuit, for example, has concluded that "the 'factor other than sex' exception applies when the disparity results from unique characteristics of the same job; from an individual's experience, training, or ability . . ." —in

---

[14] When there is a factual dispute over whether the Equal Pay Act was violated, courts have established a procedure for resolving such disputes which differs somewhat from the Title VII format. *See supra* note 6; *see also Md. Ins. Admin.*, 879 F.3d at 120.

[15] *See Riser v. QEP Energy*, 776 F.3d 1191, 1198 (10th Cir. 2015); *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 526 (2d Cir. 1992); *EEOC v. J.C. Penney Co.*, 843 F.2d 249, 253 (6th Cir. 1988); *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988). *But see Taylor v. White*, 321 F.3d 710, 717–18 (8th Cir. 2003) ("[W]e are reluctant to establish any per se limitations to the 'factor other than sex' exception. . . ."); *Covington v. S. Ill. Univ.*, 816 F.2d 317, 321–22 (7th Cir. 1987).

other words, job related reasons.[16] *Glenn*, 841 F.2d at 1571. Although some courts occasionally use "job-related" and terminology like "business-related" or "legitimate business reason[s]" interchangeably, we believe that it is neither helpful nor advisable to do so. Terms like "business-related" have been used loosely in a number of cases to refer to factors that are in fact job related. For example, in *Aldrich*, the Second Circuit used interchangeably the terms "job-relatedness requirement," "legitimate business related differences in work responsibilities and qualifications for the particular positions," and "legitimate business-related considerations" to describe "the proper legal standard for the factor-other-than-sex defense." 963 F.2d at 525, 527. Remanding the case to the district court, however, the Second Circuit was clear in its instructions: the employer could justify the wage differential "*only if the employer proves that the [factor relied on] is job-related.*" *Id.* at 527 (emphasis added).[17]

---

[16] Although the Eleventh Circuit also listed "special exigent circumstances connected with the business," it did so in reference to "red circle rates." *Glenn*, 841 F.2d at 1571 (quoting H.R. Rep. No. 88-309, at 3). Red circle rates, a term from the War Labor Board, refers to "unusual, higher than normal wage rates" paid when "an employer...must reduce help in a skilled job" so that skilled employees are "available when they are again needed for their former jobs." H.R. Rep. No. 88-309, at 3. In other words, these rates are paid based on the skills and experience of the particular employee who is temporarily transferred to a position requiring fewer skills and normally paying less. In short, red circle rates are indeed job related.

[17] We have been able to find only one circumstance in which the use of the term "business-related" does not refer to a factor that is in fact job related. In *EEOC v. J.C. Penney Co.*, the Sixth

Including "business-related" as a legitimate basis for exceptions under the catchall provision would permit the use of far too many improper justifications for avoiding the strictures of the Act. Not every reason that makes economic sense—in other words, that is business related—constitutes an acceptable factor other than sex. To the contrary, using the word "business" risks conflating a legitimate factor other than sex with any cost-saving mechanism. The Supreme Court and Congress have repeatedly rejected such an interpretation of the fourth exception.

In *Corning*, the Supreme Court readily dismissed the notion that an employer may pay women less under the catchall exception because women cost less to employ, thus saving the employer money. The Court explained that the "market forces theory"—that women will be willing to accept lower salaries because they will not find higher salaries elsewhere—did not constitute a factor other than sex even though such a method of setting salaries could have saved the company a considerable amount and so would have constituted a good "business" reason. *Corning*, 417

Circuit concluded that a health benefits plan that provided spousal coverage only if the employee was the "head of household" (i.e. the higher earner) was justified by the "legitimate business reason" of "minimizing or controlling cost." 843 F.2d 249, 253 (7th Cir. 1988); *see also Wambheim v. J.C. Penney Co.*, 705 F.2d 1492, 1495 (9th Cir. 1983) (same). The EEOC approved the system grudgingly, requiring that any such defense be "closely scrutinized" because it "bears no relationship to the requirements of the job or to the individual's performance on the job." 29 C.F.R. § 1620.21 (2017). In fact, a head-of-household benefits system appears to be in considerable tension with *City of Los Angeles, Department of Water & Power v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978). *See infra.*

U.S. at 205, 94 S.Ct. 2223. The Court explained that "Congress declared it to be the policy of the Act to correct" the "unfair employer exploitation of this source of cheap labor." *Id.* at 206, 94 S.Ct. 2223 (quoting *Hodgson v. Corning Glass Works*, 474 F.2d 226, 234 (2d Cir. 1973)). "That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work." *Id.* at 205, 94 S.Ct. 2223.

Congress and the Supreme Court have also rejected the notion that an employer may pay women less under the catchall exception because women cost more to employ. In *City of Los Angeles, Department of Water & Power v. Manhart*, the Supreme Court considered whether the Department's practice of requiring female employees—who on average lived longer than male employees—to make larger contributions from their paychecks to its pension fund than male employees was a discriminatory employment practice. 435 U.S. at 704–05, 98 S.Ct. 1370.[18] In deciding that this alleged cost difference was not a permissible factor other than sex, the Court explained that Congress had rejected an amendment to the Equal Pay Act "that would have expressly authorized a wage differential tied to the 'ascertainable and specific added cost resulting from employment of the opposite sex.'" *Id.* at

---

[18] Because the plaintiffs alleged a violation of Title VII based on unequal wages for equal work, the Equal Pay Act's affirmative defenses, including the catchall exception, applied through the Bennett Amendment to Title VII. *Id.* at 707, 712 n.22, 98 S.Ct. 1370 (citing 42 U.S.C. § 2000e-2(h)).

717 n.32, 98 S.Ct. 1370 (quoting 109 Cong. Rec. 9217 (statement of Rep. Findley)). Acknowledging that the legislative history is inconclusive as to whether a cost-justification exception could constitute a factor other than sex, the Court noted that "[i]t is difficult to find language in the statute supporting even this limited defense." *Id.* The Court also emphasized that the Wage and Hour Administrator, then charged with enforcing the Act, had interpreted that "a wage differential based on differences in the average costs of employing men and women is not based on a factor other than sex.'" *Id.* at 714 n.26, 98 S.Ct. 1370 (quoting 29 C.F.R. § 800.151 (1977)). The Equal Employment Opportunity Commission, the agency now charged with enforcing the Equal Pay Act, continues to interpret the Act this way. *See* 29 C.F.R. § 1620.22 (2017). Thus, although the catchall exception applies to a wide variety of job-related factors, it does not encompass reasons that are simply good for business. We use "job-related" rather than "business-related" to clarify the scope of the exception.

4.

Prior salary does not fit within the catchall exception because it is not a legitimate measure of work experience, ability, performance, or any other job-related quality. It may bear a rough relationship to legitimate factors other than sex, such as training, education, ability, or experience, but the relationship is attenuated. More important, it may well operate to perpetuate the wage disparities prohibited under the Act. Rather than use a second-rate surrogate that likely masks continuing inequities, the employer must instead point directly to the underlying factors for which prior salary is a rough proxy, at best, if it is to

prove its wage differential is justified under the catchall exception.

C.

We took this case *en banc* to clarify our law and the effect of *Kouba v. Allstate Insurance Co.*, 691 F.2d 873 (9th Cir. 1982). In *Kouba*, we concluded that "the Equal Pay Act does not impose a strict prohibition against the use of prior salary." *Id.* at 878. Here, the district court recognized that its holding that prior salary alone cannot justify a wage differential potentially conflicted with *Kouba*, in which the salary structure was based on multiple factors including prior salary. *Rizo*, 2015 WL 9260587, at *12. The three-judge panel concluded that our decision in *Kouba* permits an employer to "maintain a pay differential based on prior salary . . . only if it showed that the factor 'effectuate[s] some business policy' and that the employer 'use[s] the factor reasonably in light of the employer's stated purpose as well as its other practices.'" *Rizo*, 854 F.3d at 1161, 1165 (alterations in original) (quoting *Kouba*, 691 F.2d at 878). The panel explained that *Kouba* "did not attribute any significance to [the employer's] use of [ ] other factors"—ability, education, and experience—in addition to prior salary in setting employees' initial salaries. *Id.* at 1166. At the same time, *Kouba* directed the district court on remand to consider the extent to which "the employer also uses other available predictors of the new employee's performance." *Kouba*, 691 F.2d at 878.

Because *Kouba*, however construed, is inconsistent with the rule that we have announced in this opinion, it must be overruled. First, a factor other than sex

must be one that is job related, rather than one that "effectuates some business policy." Second, it is impermissible to rely on prior salary to set initial wages. Prior salary is not job related and it perpetuates the very gender-based assumptions about the value of work that the Equal Pay Act was designed to end. This is true whether prior salary is the sole factor or one of several factors considered in establishing employees' wages. Although some federal courts of appeals allow reliance on prior salary along with other factors while barring reliance on prior salary alone, *see, e.g., Glenn*, 841 F.2d at 1571 & n.9, this is a distinction without reason: we cannot reconcile this distinction with the text or purpose of the Equal Pay Act. Although Judges McKeown and Callahan correctly acknowledge in their concurrences that basing initial salary on an employee's prior salary alone violates the Equal Pay Act, neither offers a rational explanation for their incompatible conclusion that relying on prior salary in addition to one or more other factors somehow is consistent with the Act. Declining to explain the inconsistency of their positions, they simply rely on those who came before—the EEOC and other courts of appeals, which also fail to explain how what is impermissible alone somehow becomes permissible when joined with other factors. For obvious reasons, we cannot agree. Reliance on past wages simply perpetuates the past pervasive discrimination that the Equal Pay Act seeks to eradicate. Therefore, we readily reach the conclusion that past salary may not be used as a factor in initial wage setting, alone or in conjunction with less invidious factors.

Conclusion

Unfortunately, over fifty years after the passage of the Equal Pay Act, the wage gap between men and women is not some inert historical relic of bygone assumptions and sex-based oppression. Although it may have improved since the passage of the Equal Pay Act, the gap persists today: women continue to receive lower earnings than men "across industries, occupations, and education levels."[19] "Collectively, the gender wage gap costs women in the U.S. over $840 billion a year."[20] If money talks, the message to women costs more than "just" billions: women are told they are not worth as much as men. Allowing prior salary to justify a wage differential perpetuates this message, entrenching in salary systems an obvious means of discrimination—the very discrimination that the Act was designed to prohibit and rectify.

AFFIRMED AND REMANDED.

McKEOWN, Circuit Judge, with whom MURGUIA, Circuit Judge, joins, concurring:

---

[19] Equal Rights Advocates Amicus Br. at 12 (footnotes omitted) (first citing Nat'l P'ship for Women & Families, *America's Women and the Wage Gap* 2 (2017), http://www.national partnership.org/.esearchlibrary/workplacefairness/fair-pay/americas-women-and-thewage-gap.pdf; and then citing Francine D. Blau & Lawrence M. Kahn, *The Wage Gap: Extent, Trends, and Explanations*, (Nat'l Bureau of Econ. Research, Working Paper No. 21913, 2016), http://www.nber.org/papers/w 21913.pdf).

[20] *Id.* at 11 (citing Nat'l P'ship for Women & Families, *supra* note 19, at 1).

For decade after decade, gender discrimination has been baked into our pay scales, with the result that women still earn only 80 percent of what men make. Unfortunately, women employed in certain sectors face an even larger gap. This disparity is exacerbated when a woman is paid less than a man for a comparable job solely because she earned less at her last job. The Equal Pay Act prohibits precisely this kind of "piling on," where women can never overcome the historical inequality.

I agree with most of the majority opinion—particularly its observation that past salary can reflect historical sex discrimination. But the majority goes too far in holding that any consideration of prior pay is "impermissible" under the Equal Pay Act, even when it is assessed with other job-related factors such as experience, education, past performance and training. In my view, prior salary alone is not a defense to unequal pay for equal work. If an employer's only justification for paying men and women unequally is that the men had higher prior salaries, odds are that the one-and-only "factor" causing the difference is sex. However, employers do not necessarily violate the Equal Pay Act when they consider prior salary among other factors when setting initial wages. To the extent salary is considered with other factors, the burden is on the employer to show that any pay differential is based on a valid job-related factor other than sex.

To be sure, the majority correctly decides the only issue squarely before the court: whether the Fresno County Office of Education was permitted to base Aileen Rizo's starting salary solely on her prior salary. The answer is no. But regrettably, the majority goes

further and effectively bars any consideration of prior salary in setting a new salary. Not only does Rizo's case not present this issue, but this approach is unsupported by the statute, is unrealistic, and may work to women's disadvantage.

Rizo's case is an easy one. After she was hired as a math consultant, she learned that male colleagues in the same job were being hired at a higher salary. The only rationale offered by the County was that Rizo's salary was lower at a prior job. In effect, the County "was still taking advantage of the availability of female labor to fill its [position] at a differentially low wage rate not justified by any factor other than sex"—a practice long held unlawful. *See Corning Glass Works v. Brennan*, 417 U.S. 188, 208, 94 S.Ct. 2223 (1974); *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1570 (11th Cir. 1988) ("[T]he argument that supply and demand dictates that women *qua* women may be paid less is exactly the kind of evil that the [Equal Pay] Act was designed to eliminate, and has been rejected."); *Drum v. Leeson Elec. Corp.*, 565 F.3d 1071, 1073 (8th Cir. 2009) (It is "prohibited" to rely on the "'market force theory' to justify lower wages for female employees simply because the market might bear such wages.").

This scenario provides a textbook violation of the "equal pay for equal work" mantra of the Equal Pay Act. Prior salary level created the only differential between Rizo and her male colleagues. The County did not, for example, consider Rizo's two advanced degrees or her prior experience in setting her initial salary. This historical imbalance entrenched unequal pay for equal work based on sex—end of story. The County cannot mount a defense on past salary alone.

Congress enacted the Equal Pay Act to root out historical sex discrimination, declaring it the "policy" of the Act "to correct the conditions" of "wage differentials based on sex." Pub. L. No. 88-38, 77 Stat. 56 (1963). At the signing ceremony, President John F. Kennedy called the Act "a first step" in "achiev[ing] full equality of economic opportunity—for the average woman worker earns only 60 percent of the average wage for men." President John F. Kennedy, Remarks Upon Signing the Equal Pay Act (June 10, 1963), http://www.presidency.ucsb.edu/ws/?pid=9267. The unqualified goal of the statute was to "eliminate wage discrimination based upon sex." H.R. REP. NO. 88-309, at 1 (1963). Sadly, that gap remains today—with the median salary of a female employee being only 80 percent of that of a male. *See* NAT'L P'SHIP FOR WOMEN & FAMILIES, AMERICA'S WOMEN AND THE WAGE GAP 1 (2017), https://goo.gl/SLEcd8.

Given the stated goal of the Equal Pay Act to erase the gender wage gap, it beggars belief that Congress intended for historical pay discrepancies like Rizo's to justify pay inequity. *See Corning*, 417 U.S. at 195, 94 S.Ct. 2223 ("Congress' purpose in enacting the Equal Pay Act was to remedy . . . [an] endemic problem of employment discrimination . . . based on an ancient but outmoded belief that a man . . . should be paid more than a woman even though his duties are the same."). Congress recently noted that the existence of gender-based pay disparities "has been spread and perpetuated" since the passage of the Act and "many women continue to earn significantly lower than men for equal work." H.R. REP. No. 110-783, at 1–2 (2008). "In many instances, the pay disparities can only be due to continued intentional discrimination *or the*

lingering effects of past discrimination." *Id.* (emphasis added). Because past pay can reflect the very discrimination Congress sought to eradicate in the statute, allowing employers to defend unequal pay for equal work on that basis alone risks perpetuating unlawful inequity. C.f. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 647, 127 S.Ct. 2162 (2007) (Ginsburg, J., dissenting), dissenting position adopted by legislative action (Jan. 29, 2009) ("Paychecks perpetuating past discrimination . . . are actionable . . . because they discriminate anew each time they issue."). That danger is best avoided by construing the Equal Pay Act "to fulfill the underlying purposes which Congress sought to achieve" and rejecting prior salary as its own "factor other than sex" defense. *Corning*, 417 U.S. at 208, 94 S.Ct. 2223.

Yet I differ with the majority in one key respect. Merely because prior pay is unavailable as a standalone defense does not mean that employers may never use past pay as a factor in setting initial wages.[1] Using prior salary along with valid job-related factors such as education, past performance and training may provide a lawful benchmark for starting salary in appropriate cases.[2] This interpretation of the statute

---

[1] Contrary to the majority's assertion, it is wholly consistent to forbid employers from baldly asserting prior salary as a defense— without determining whether it accurately measures experience, education, training or other lawful factors—and to permit consideration of prior salary along with those valid factors.

[2] As Congress observed, "there are many factors which may be used to measure the relationships between jobs and which establish a valid basis for a difference in pay." H.R. REP. NO. 88-309, at 3 (1963). But "wage differentials based *solely* on the sex

still places the burden on the employer to justify that salary is determined on the basis of "any other factor other than sex."

My views align with those of the Equal Employment Opportunity Commission ("EEOC"), the agency charged with administering the Act, and most of our sister circuits that have addressed the question. The EEOC's Compliance Manual states:

> [A]n employer may consider prior salary as part of a mix of factors—as, for example, where the employer also considers education and experience and concludes that the employee's prior salary accurately reflects ability, based on job-related qualifications. But because "prior salaries of job candidates can reflect sex-based compensation discrimination," "[p]rior salary cannot, by itself, justify a compensation disparity."

EEOC Amicus Br. 7 (quoting EEOC Compliance Manual, Compensation Discrimination § 10-IV.F.2.g (Dec. 5, 2000), *available at* https://www.eeoc.gov/policy/docs/compensation.html).

The Tenth and Eleventh Circuits reached the same conclusion, holding that prior pay alone cannot justify a compensation disparity. *See Riser v. QEP Energy*, 776 F.3d 1191, 1199 (10th Cir. 2015) (an employer may decide to pay an elevated salary to an applicant who rejects a lower offer, but the Act "precludes an employer from relying solely upon a prior salary to justify pay disparity"); *Irby v. Bittick*, 44 F.3d 949, 955

---

of the employee are an unfair labor standard." *Id.* at 2–3 (emphasis added).

(11th Cir. 1995) ("This court has not held that prior salary can never be used by an employer to establish pay, just that such a justification cannot solely carry the affirmative defense."). The Eighth Circuit has adopted a similar approach, permitting the use of prior salary as a defense, but "carefully examin[ing] the record to ensure that an employer does not rely on the prohibited 'market force theory' to justify lower wages" for women based solely on sex. *Drum*, 565 F.3d at 1073. The Second Circuit likewise allows the prior-salary defense, but places the burden on an employer to prove that a "bona fide business-related reason exists" for a wage differential—i.e., one that is "rooted in legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue." *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 525–26 (1992).

Only the Seventh Circuit has veered far off course, holding that prior salary is *always* a "factor other than sex." *See Wernsing v. Dep't of Human Servs., State of Illinois*, 427 F.3d 466, 468–70 (2005). But its conclusion—that a "factor other than sex" need not be "related to the requirements of the particular position" or even "business related"—contravenes the Act's purpose of ensuring women and men earn equal pay for equal work. *Id.* at 470. After all, inherent in the Act is an understanding that compensation should mirror one's "skill, effort, and responsibility." *See Corning*, 417 U.S. at 195, 94 S.Ct. 2223 (quoting 29 U.S.C. § 206(d)(1)); *see also* Glenn, 841 F.2d at 1571. Because we know that historical sex discrimination persists, it cannot be that prior salary always reflects a factor other than sex.

I fear, however, that the majority makes the same categorical error as the Seventh Circuit, but in the opposite direction: it announces that prior salary is *never* a "factor other than sex." By forbidding consideration of prior salary altogether, the majority extends the scope of the statute and risks imposing Equal Pay Act liability on employers for using prior salary as *any* part of the calculus in making wage-setting decisions. That, too, is a drastic holding, particularly because companies and institutions often consider prior salary in making offers to lure away top talent from their competitors or to attract employees with specific skills. In unpacking what goes into the calculation, it may well be that salary accurately gauges a prospective employee's "skill, effort, and responsibility," as the Equal Pay Act envisions—in addition to her education, training, and past performance—and a new employer wants to exceed that benchmark. The Equal Pay Act should not be an impediment for employees seeking a brighter future and a higher salary at a new job. *See generally* ORLY LOBEL, TALENT WANTS TO BE FREE 49–75 (Yale Univ. Press 2013) (concluding that employee mobility between competitors promotes innovation and job growth); Cade Metz, *Tech Giants Are Paying Huge Salaries for Scarce A.I. Talent*, N.Y. TIMES, Oct. 23, 2017, at B1 (noting that employers pay a premium to hire top engineering talent).

On that front, states have begun passing statutes that prohibit employers from asking employees about their prior salaries.[3] California's statute just went

---

[3] A bill has been introduced in Congress to enact a federal prohibition on "requiring" or "requesting" that prospective

into effect. *See* Cal. Labor Code § 432.3. Those laws represent creative efforts to narrow the gender wage gap. But they also provide important exemptions for employees who wish to disclose prior salaries as part of a salary negotiation. *See, e.g.*, Cal. Labor Code § 432.3(g). Although the majority professes that its decision does not relate to negotiated salaries, the principle of the majority's holding may reach beyond these state statutes by making it a violation of federal antidiscrimination law to consider prior salary, even when an employee chooses to provide it as a bargaining chip for higher wages. I am concerned about chilling such voluntary discussions. Indeed, the result may disadvantage rather than advantage women.

To avoid those consequences, the majority endeavors to limit its decision by announcing that it "express[es] a general rule and do[es] not attempt to resolve its applications under all circumstances." The majority disclaims, for example, deciding "whether or under what circumstances, past salary may play a role in the course of an individualized salary negotiation." *See* Maj. Op. at 461. The majority's disclaimer hardly cushions the practical effect of its "general rule." Because the majority makes it "impermissible to rely on prior salary to set initial wages" under the Act, it has left little daylight for arguing that negotiated starting salaries should be treated differently than established pay scales. *See* Maj. Op. at 468. In the

---

employees disclose previous wages or salary history. *See* H.R. 2418, 115th Cong. (2017). Like its state counterparts, this bill does not seek to outlaw salary negotiations initiated by an employee.

real world, an employer "rel[ies] on prior salary to set initial wages" when it takes the prior salary offered voluntarily by an employee in negotiations and sets a starting salary above those past wages, even if there is an established pay scale.

The more limited holding adopted by our sister circuits better accords with common sense and the statutory text. The Equal Pay Act provides an affirmative defense for "*any* other factor other than sex." *See* 29 U.S.C. § 206(d)(1) (emphasis added). The majority opinion recognizes that "legitimate, job-related factors such as a prospective employee's experience, educational background, ability, or prior job performance" operate as affirmative defenses. But the majority nonetheless renders those valid, job-related factors nugatory when an employer also considers prior salary. That is a puzzling outcome.

For these reasons, I concur in the result, but not the majority's rationale.

CALLAHAN, Circuit Judge, with whom TALLMAN, Circuit Judge, joins, concurring:

We all agree that men and women should receive equal pay for equal work regardless of gender. Indeed, we agree that the purpose of the Equal Pay Act of 1963 was to change "should receive equal pay" to "must receive equal pay." However, I write separately because in holding that prior salary can never be considered, the majority fails to follow Supreme Court precedent, unnecessarily ignores the realities of business and, in doing so, may hinder rather than promote equal pay for equal work.

The factual fallacies of the majority opinion are, first, that prior salary is not generally job-related, and second, that prior salary inherently reflects wage discrepancies based on gender. In fact, prior salary is a prominent consideration for both a job applicant and the potential employer. The applicant presumably seeks a job that will pay her more and the potential employer recognizes that it will have to pay her more if it wants to hire her. Of course, a prior salary might reflect a wage discrepancy based on gender, but this does not justify the majority's absolute position.

Prior salary serves, in combination with other factors, to allow employers to set a competitive salary that will entice potential employees to take the job. The majority's approach ignores these economic incentives and appears to demand a lockstep pay system such as is often used in government service.[1] We allow private industry more flexibility. In the private sector, basing initial salary upon previous salary, plus other factors such as experience and education, encourages hard work and rewards applicants who have stellar credentials. The majority opinion stifles these economic incentives with a flat prohibition on ever considering prior salary, no matter how enlightened or non-discriminatory it may have been.

Second, the assumption that prior salary inherently reflects gender bias is not true. The majority opinion completely ignores economic disparity in pay for the same jobs performed in different parts of the country,

---

[1] *See United States Office of Personnel Management*, https://www.opm.gov/policy-data-oversight/pay-leave/pay-systems/federal-wagesystem/ (last visited Feb. 21, 2018).

where costs of living are lower and demand for available jobs may exceed the supply of available and highly competitive positions. While there is no question that prior salary in some instances may well reflect gender discrimination, this is not always the case. Historically, differences in prior salaries may simply reflect the differing costs of living in various parts of the country. And the flat prohibition ignores the fact that when the prior salary was set there may well have been more qualified job seekers than there were available jobs to fill.

I

As required by the Equal Pay Act, Rizo, at least for the purposes of a motion for summary judgment, made a prima facie case of pay discrimination by showing that (1) she performed substantially equal work to that of her male colleagues; (2) the work conditions were basically the same; and (3) the male employees were paid more. *See Riser v. QEP Energy*, 776 F.3d 1191, 1196 (10th Cir. 2015).

The County does not contest the prima facie case but argues that Rizo's salary was exempt from Equal Pay Act coverage under the fourth exception in 29 U.S.C. § 206(d)(1). Subsection (d)(1) reads:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill,

> effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

We agree that this suit turns on our interpretation of the fourth exception in 29 U.S.C. § 206(d)(1): "a differential based on any other factor other than sex."

II

"The Equal Pay Act is broadly remedial and it should be construed and applied so as to fulfill the underlying purposes which Congress sought to achieve." *Corning Glass Works v. Brennan*, 417 U.S. 188, 208, 94 S.Ct. 2223 (1974). The majority struggles mightily and unnecessarily to couple the fourth exception—despite its clear language—so closely with the other three exceptions that it loses independent meaning.[2] In doing so, the majority conveniently overlooks the differences within the three specific

---

[2] The majority invokes the old chestnuts of statutory interpretation, *noscitur a sociis* and *ejusdem* generis, but they are not very helpful. The Supreme Court in Corning Glass, 417 U.S. at 196, 94 S.Ct. 2223, recognized that the Equal Pay Act "establishes four exceptions— three specific and one general catchall provision." It follows that *noscitur a sociis*— "a word is known by the company it keeps"— does not aid our interpretation of the statute because the catchall provision is intended to contrast with the specific exceptions, not reflect them. For the same reason, *ejusdem generis* is of little assistance as the "catchall provision" is not intended to be similar to the specific exceptions.

exceptions. While merit systems and measuring earnings by quantity and quality of production are specifically job-related, that is not true of seniority systems. Indeed, at the time of the passage of the Equal Pay Act, if not today, seniority systems accounted for a fair amount of pay inequality.[3] Furthermore, the majority's insistence that the fourth exception is limited to specific job-related qualities is contrary to the Supreme Court's statement that the fourth exception "was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination." *Washington Cty. v. Gunther*, 452 U.S. 161, 170, 101 S.Ct. 2242 (1981).[4]

---

[3] For example, one-quarter of the complaints filed in the year after the passage of the Equal Pay Act concerned complaints by women that they were excluded from jobs because of seniority rules or because men were preferred over women after layoffs. Vicki Lens, *Supreme Court Narratives on Equality and Gender Discrimination in Employment: 1971–2002*, 10 Cardozo Women's L.J. 501, 507 (2004).

[4] The paragraph from which this quote is taken reads in full: More importantly, incorporation of the fourth affirmative defense could have significant consequences for Title VII litigation. Title VII's prohibition of discriminatory employment practices was intended to be broadly inclusive, proscribing "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971). The structure of Title VII litigation, including presumptions, burdens of proof, and defenses, has been designed to reflect this approach. The fourth affirmative defense of the Equal Pay Act, however, was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination. H.R. Rep. No. 309, 88th Cong., 1st Sess., 3 (1963), U.S. Code Cong. & Admin. News 1963, p. 687. Equal Pay Act litigation, therefore, has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a bona

Thus, the Equal Pay Act's fourth exception for any "differential based on any other factor other than sex" allows for reasonable business reasons that extend beyond the narrow definition of job-related.

More importantly, the limitation of "any other factor other than sex" to specific job-related qualities is contrary to the Supreme Court's approach in Washington County. The Court explained that Equal Pay Act litigation "has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a bona fide use of 'other factors other than sex.'" 452 U.S. at 170, 101 S.Ct. 2242. The Court went on to hold that courts and administrative agencies were not permitted to substitute their judgment for the judgment of the employer "so long as it does not discriminate on the basis of sex." *Id.* at 171, 101 S.Ct. 2242. Thus, we are directed not to look to whether a differential is specifically job-related, but whether regardless of its

---

fide use of "other factors other than sex." Under the Equal Pay Act, the courts and administrative agencies are not permitted to "substitute their judgment for the judgment of the employer . . . who [has] established and applied a bona fide job rating system," so long as it does not discriminate on the basis of sex. 109 Cong.Rec. 9209 (1963) (statement of Rep. Goodell, principal exponent of the Act). Although we do not decide in this case how sex-based wage discrimination litigation under Title VII should be structured to accommodate the fourth affirmative defense of the Equal Pay Act, *see* n.8, supra, we consider it clear that the Bennett Amendment, under this interpretation, is not rendered superfluous.

Washington Cty., 452 U.S. at 170–71, 101 S.Ct. 2242 (footnote omitted).

"job-relatedness," it is attributable to sex discrimination.[5]

III

I agree that based on the history of pay discrimination and the broad purpose of the Equal Pay Act, prior salary by itself is not inherently a "factor other than sex." As the Eleventh Circuit noted, "if prior salary alone were a justification, the exception would swallow up the rule and inequality in pay among genders would be perpetuated." *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995). However, the Eleventh Circuit continued:

---

[5] This conclusion is further supported by a footnote in the Court's decision, which states:

> The legislative history of the Equal Pay Act was examined by this Court in *Corning Glass Works v. Brennan*, 417 U.S. 188, 198201, 94 S.Ct. 2223, 2229–2231, 41 L.Ed.2d 1 (1974). The Court observed that earlier versions of the Equal Pay bill were amended to define equal work and to add the fourth affirmative defense because of a concern that bona fide job-evaluation systems used by American businesses would otherwise be disrupted. *Id.*, at 199–201, 94 S.Ct. at 2230–2231. This concern is evident in the remarks of many legislators. Representative Griffin, for example, explained that the fourth affirmative defense is a "broad principle," which "makes clear and explicitly states that a differential based on any factor or factors other than sex would not violate this legislation." 109 Cong.Rec. 9203 (1963). See also *id.*, at 9196 (remarks of Rep. Frelinghuysen); *id.*, at 9197–9198 (remarks of Rep. Griffin); *ibid.*, (remarks of Rep. Thompson); *id.*, at 9198 (remarks of Rep. Goodell); *id.*, at 9202 (remarks of Rep. Kelly); *id.*, at 9209 (remarks of Rep. Goodell); *id.*, at 9217 (remarks of Reps. Pucinski and Thompson).

Washington Cty., 452 U.S. at 170 n.11, 101 S.Ct. 2242.

> an Equal Pay Act defendant may successfully raise the affirmative defense of "any other factor other than sex" if he proves that he relied on prior salary and experience in setting a "new" employee's salary. While an employer may not overcome the burden of proof on the affirmative defense of relying on "any other factor other than sex" by resting on prior pay alone, as the district court correctly found, there is no prohibition on utilizing prior pay as part of a mixed-motive, such as prior pay and more experience. This court has not held that prior salary can never be used by an employer to establish pay, just that such a justification cannot solely carry the affirmative defense.

Id.

Many of our sister circuits are in accord. The Tenth Circuit has held that "an individual's former salary can be considered in determining whether pay disparity is based on a factor other than sex," but that "the EPA 'precludes an employer from relying solely upon a prior salary to justify pay disparity.'" *Riser*, 776 F.3d at 1199 (citing *Angove v. Williams–Sonoma, Inc.*, 70 Fed.Appx. 500, 508, 2003 WL 21529409 (10th Cir. 2003) (unpublished)). The Second and Sixth Circuits are basically in agreement. See *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 525 (2d Cir. 1992) (recognizing "that job classification systems may qualify under the factor-other than-sex defense only when they are based on legitimate business-related considerations"); *EEOC v. J.C. Penney Co. Inc.*, 843 F.2d 249, 253 (6th Cir. 1988) (holding that "the legitimate business record standard is the appropriate

benchmark against which to measure the 'factor other than sex'".[6]

This approach reflects that the fourth exception was intended to be, and is, broad. Thus, while a pay system that relied exclusively on prior salary is conclusively presumed to be gender based—to perpetuate gender based inequality—a pay system that uses prior pay as one of several factors deserves to be considered on its own merits. When a plaintiff makes a prima facie case of pay inequality based on gender, the burden of showing that the difference is not based on gender shifts to the employer. In other words, the prima facie case creates a presumption that the pay inequality arising from the employer's pay system is gender based and hence is not a "factor other than sex." In *Corning Glass*, the Supreme Court explained that the Equal Pay Act's

> structure and history also suggest that once the Secretary has carried his burden of showing that the employer pays workers of one sex more than workers of the opposite sex for equal work, the burden shifts to the employer to show that the

---

[6] The Seventh and Eighth Circuits prefer an even broader definition for "factor other than sex." *Covington v. S. Ill. Univ.*, 816 F.2d 317, 321–22 (7th Cir. 1987) (holding that the EPA does not preclude "an employer from carrying out a policy which, although not based on employee performance, has in no way been shown to undermine the goals of the EPA"); *Taylor v. White*, 321 F.3d 710, 720 (8th Cir. 2003) (stating that "a case-by-case analysis of reliance on prior salary or salary retention policies with careful attention to alleged gender-based practices preserves the business freedoms Congress intended to protect when it adopted the catch-all 'factor other than sex' affirmative defense").

differential is justified under one of the Act's four exceptions.

Corning Glass, 417 U.S. at 196, 94 S.Ct. 2223; *see also Maxwell v. City of Tucson*, 803 F.2d 444, 445–46 (9th Cir. 1986) (stating that once the plaintiff establishes a prima facie case, "the burden shifts to the employer to show that the wage disparity is permitted by one of the four statutory exceptions to the Equal Pay Act"). There is no justification for holding that an employer could, as a matter of law, justify the differential under one of the first three exceptions, but not the fourth exception. Accordingly, I differ from the majority in that I think, as do the majority of our sister circuits, that when salary is established based on a multi-factor salary system that includes prior salary, the presumption that the system is based on gender is rebuttable.[7]

This is also the position of the EEOC, the agency charged with enforcing the EPA. In its amicus brief, the EEOC states that in its view because prior salaries "can reflect sex-based compensation discrimination," a prior salary "cannot by itself justify a compensation disparity," but "an employer may consider prior salary as part of a mix of factors."[8] That seems a reasonable

---

[7] I agree with the majority that the market force theory for paying women less was discredited by the Supreme Court in Corning Glass, 417 U.S. at 205, 94 S.Ct. 2223, and that the notion that an employer may pay women less because women allegedly cost more to employ than men was discredited in City of Los Angeles, *Department of Water & Power v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370 (1978). *See* Majority Opinion at 466–67.

[8] In EEOC Notice Number 915.002 (Oct. 29, 1997), "Enforcement Guidance on Sex Discrimination in the

approach to a multi-faceted decision to formulate a rate of pay.

In sum, I note that "prior pay" is not inherently a reflection of gender discrimination. Differences in prior pay may well be based on other factors such as the cost of living in different parts of our country. Also, it is possible, and we hope in this day probable, that the prior employer had adjusted its pay system to be gender neutral. Nonetheless, consistent with the intent of the EPA, I agree that where prior pay is the exclusive determinant of pay, the employer cannot carry its burden of showing that it is a "factor other than sex."[9] However, neither Congress's intent, nor

---

Compensation of Sports Coaches in Educational Institutions," the EEOC advised:

> Thus, if the employer asserts prior salary as a factor other than sex, evidence should be obtained as to whether the employer: 1) consulted with the employee's previous employer to determine the basis for the employee's starting and final salaries; 2) determined that the prior salary was an accurate indication of the employee's ability based on education, experience, or other relevant factors; and 3) considered the prior salary, but did not rely solely on it in setting the employee's current salary.

[9] We read the EPA to place the burden on the employer to demonstrate that the pay differential falls within the fourth exception; that it is indeed not based on gender. An employer cannot meet this burden where the pay system is based solely on prior pay because by blindly accepting the prior pay, it cannot rebut the presumption that using the prior pay perpetuates the inequality of pay based on gender that the EPA seeks to correct. If, instead, as suggested by the EEOC's Notice Number 915.002, an employer not only looked to prior pay but also researched whether the applicant's prior pay reflected gender based inequality, and made adjustments if it did, the employer would no longer be relying exclusively on prior pay. Thus, in such a

the language of the Equal Pay Act, nor logic, requires, or justifies, the conclusion that a pay system that includes prior pay as one of several ingredients can never be a "factor other than sex," and thus fails to come within the fourth exception to the Equal Pay Act.

IV

In this case, the County based pay only on prior salary, and accordingly the district court properly denied it summary judgment. Nonetheless, the majority unnecessarily, incorrectly, and contrary to Supreme Court precedent, insists that prior salary can never be a factor in a pay system that falls within the fourth exception to the Equal Pay Act. Accordingly, I concur separately because following the Supreme Court's guidance, I agree with the Tenth and Eleventh Circuits, as well as the EEOC, the agency charged with enforcing the EPA, that prior pay may be a component of a pay system that comes within the fourth exception recognized in 29 U.S.C. § 206(d)(1). A defense to a pay discrimination claim will lie if the employer meets its burden of showing that its system does not perpetuate or create a pay differential based on sex. We should not have reached out to hold otherwise, particularly as there was no need to do so.[10]

---

situation, an employer might be able to overcome the presumption and show that its pay system was a "factor other than sex."

[10] The majority's assertion that it expresses a "general rule" and does not "attempt to resolve its application under all circumstances" (Majority Opinion at 461) is at odds with its conclusion that past salary cannot be considered "alone or in conjunction with less invidious factors." Majority Opinion at 468. As Judge McKeown notes in her separate concurrence, the

For these reasons, I concur in the result, but not the majority's rationale.

WATFORD, Circuit Judge, concurring in the judgment:

I agree with the result the majority reaches, but I arrive there through a somewhat different reading of the statute.

The Equal Pay Act prohibits employers from discriminating "on the basis of sex" by paying female employees less than their male counterparts for doing the same work. 29 U.S.C. § 206(d)(1). The Act allows an employer to justify such a pay disparity by proving, as an affirmative defense, that the disparity is based on a "factor other than sex." *Id.*; *see Corning Glass Works v. Brennan*, 417 U.S. 188, 196, 94 S.Ct. 2223 (1974). In my view, past pay can constitute a "factor other than sex," but only if an employee's past pay is not itself a reflection of sex discrimination. If past pay does reflect sex discrimination, an employer cannot rely on it to justify a pay disparity, whether the employer considers past pay alone or in combination with other factors. I agree with the majority that holding otherwise would permit employers to perpetuate the very form of sex discrimination the Act was intended to outlaw.

This reading of § 206(d)(1) aligns with the Supreme Court's interpretation of the same provision in *Corning Glass*. There, *Corning Glass* had for many years paid female day-shift inspectors less than male

---

"disclaimer hardly cushions the practical effect of its 'general rule.'" McKeown Concurrence at 472.

night-shift inspectors, even though both sets of inspectors performed the same work. The company argued that this pay disparity was simply the result of prevailing market forces, which allowed men to demand and receive higher wages than women. The Court rejected that argument and held that the disparity nonetheless violated the Act's requirement of "equal pay for equal work." 417 U.S. at 205, 94 S.Ct. 2223.

The Court also rejected the company's attempt to defend its new pay system, which eliminated the pay disparity going forward. Beginning in January 1969, all newly hired inspectors would be paid the same wage regardless of shift. The company set the new, uniform wage at an hourly rate above what the day-shift inspectors had been earning but below what the night-shift inspectors made. Existing employees would be paid the new, uniform wage as well, unless they had been earning more beforehand. That meant existing day-shift inspectors got a raise (to the new, uniform wage), but existing nightshift inspectors got to retain their previous, higher wage. *Id.* at 194, 208–09 & n.29, 94 S.Ct. 2223. The Supreme Court held that the resulting pay disparity between female day-shift and male nightshift inspectors' wages was illegal: Although the disparity was attributable to a "neutral factor other than sex"—namely, past pay—the employer could not avail itself of the affirmative defense because an employee's past pay in this instance reflected sex discrimination. *Id.* at 209–10, 94 S.Ct. 2223. Holding otherwise, the Court noted, would "perpetuate the effects of the company's prior illegal practice of paying women less than men for equal work." *Id.*

I think the same analysis should govern even when an employer's prior pay practices are not overtly discriminatory, as they were in *Corning Glass*. If an employer seeks to justify paying women less than men by relying on past pay, it bears the burden of proving that its female employees' past pay is not tainted by sex discrimination, including discriminatory pay differentials attributable to prevailing market forces. *See id.* at 205, 94 S.Ct. 2223. Unfortunately, even today, in most instances that will be exceedingly difficult to do. Despite progress in closing the wage gap, gender pay disparities persist in virtually every sector of the American economy, with women today earning on average only about 82% of what men make, even after controlling for education, work experience, and other factors. *See* Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations*, 55 J. Econ. Literature 789, 797–800 (2017). It therefore remains highly likely that a woman's past pay will reflect, at least in part, some form of sex discrimination. As a result, an employer will rarely be able to justify a gender pay disparity by relying on the fact that a female employee made less than her male counterparts at her prior job.

The employer in this case failed to prove that Aileen Rizo's past pay is not tainted by sex discrimination. Her prior salary thus cannot be deemed a "factor other than sex." For that reason, I agree that the district court properly denied the County's motion for summary judgment.

APPENDIX B

Aileen RIZO, Plaintiff-Appellee,

v.

Jim YOVINO, Fresno County Superintendent of Schools, Erroneously Sued Herein as Fresno County Office of Education, Defendant-Appellant.

No. 16-15372

United States Court of Appeals, Ninth Circuit.

Argued and Submitted February 17, 2017 San Francisco, California

Filed April 27, 2017

Appeal from the United States District Court for the Eastern District of California, Michael J. Seng, Magistrate Judge, Presiding, D.C. No. 1:14-cv-00423-MJS

Before: A. WALLACE TASHIMA and ANDREW D. HURWITZ, Circuit Judges, and LYNN S. ADELMAN,** District Judge.

** The Honorable Lynn S. Adelman, United States District Judge for the Eastern District of Wisconsin, sitting by designation.

OPINION

ADELMAN, District Judge:

The plaintiff, Aileen Rizo, is an employee of the public schools in Fresno County. After discovering that the County pays her less than her male counterparts for the same work, she brought this action under the Equal Pay Act, 29 U.S.C. § 206(d), Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5, and the California Fair Employment and Housing Act, Cal. Gov. Code § 12940. When the County[1] moved for summary judgment, it conceded that it paid the plaintiff less than comparable male employees for the same work. However, it argued that this result was lawful because the pay differential was "based on any other factor other than sex," an affirmative defense to a claim under the Equal Pay Act. This other factor was prior salary, and the district court concluded that when an employer bases a pay structure "exclusively on prior wages," any resulting pay differential between men and women is not based on any other factor other than sex. *Rizo v. Yovino*, No. 1:14cv-0423-MJS, 2015 WL 9260587, at *9 (E.D. Cal. Dec. 18, 2015). Based on this conclusion, the district court denied the County's motion for summary judgment.

The district court candidly recognized that its decision potentially conflicted with this court's decision in *Kouba v. Allstate Insurance Co.*, in which we held that prior salary can be a factor other than

---

[1] The defendant is Jim Yovino, the Fresno County Superintendent of Schools. However, because Yovino is sued in his official capacity, in this opinion we will refer to the defendant as the County.

sex, provided that the employer shows that prior salary "effectuate[s] some business policy" and the employer uses prior salary "reasonably in light of [its] stated purpose as well as its other practices," 691 F.2d 873, 876–77 (9th Cir. 1982), and thus certified its decision for interlocutory appeal under 28 U.S.C. § 1292(b). We permitted that appeal and authorized the County to appeal from the order denying summary judgment.

We conclude that this case is controlled by *Kouba*. We therefore vacate the district court's order and remand with instructions to reconsider the County's motion for summary judgment.

I.

In 2009, the County hired the plaintiff as a math consultant, a position it classifies as management-level. When the County hired Rizo, it used a salary schedule known as "Standard Operation Procedure 1440" to determine the starting salaries of management-level employees. This schedule consists of twelve "levels," each of which has progressive "steps" within it. New math consultants receive starting salaries within Level 1, which has ten steps, with pay ranging from $62,133 at Step 1 to $81,461 at Step 10. To determine the step within Level 1 on which the new employee will begin, the County considers the employee's most recent prior salary and places the employee on the step that corresponds to his or her prior salary, increased by 5%.

Prior to being hired by Fresno County, the plaintiff worked as a math teacher at a middle school in Arizona. When she left that position, she was receiving a salary of $50,630 per year, plus an annual

stipend of $1,200 for her master's degree. Adding 5% to the plaintiff's prior compensation resulted in a salary lower than Fresno County's Level 1, Step 1 salary. Thus, under Standard Operation Procedure 1440, the plaintiff's starting salary was set at the minimum Level 1 salary: $62,133. However, the County also paid the plaintiff a $600 stipend for her master's degree, so her total starting pay was $62,733 per year.

In July 2012, the plaintiff was having lunch with her colleagues when a male math consultant who had recently been hired informed her that he started on Step 9 of Level 1. The plaintiff subsequently learned that the other math consultants, all of whom were male, were paid more than she was. The plaintiff complained to the County about this disparity, but the County informed her that all salaries had been properly set under Standard Operation Procedure 1440.

Dissatisfied with the County's response, the plaintiff initiated this suit. The County moved for summary judgment, arguing that the plaintiff's salary, though less than her male colleagues', was based on "any other factor other than sex," namely, prior salary. The district court determined that, under the Equal Pay Act, prior salary alone can never qualify as a factor other than sex, reasoning that "a pay structure based exclusively on prior wages is so inherently fraught with the risk... that it will perpetuate a discriminatory wage disparity between men and women that it cannot stand, even if motivated by a legitimate non-discriminatory business purpose." *Rizo*, 2015 WL 9260587, at *9. The court

therefore denied the County's motion for summary judgment.

II.

Under the Equal Pay Act, the plaintiff has the burden of establishing a prima facie case of discrimination. *Stanley v. Univ. of S. Cal.*, 178 F.3d 1069, 1073–74 (9th Cir. 1999). "The Equal Pay Act creates a type of strict liability; no intent to discriminate need be shown." *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir. 1986) (internal quotation marks and citation omitted). Thus, to make out a prima facie case, the plaintiff must show only that he or she is receiving different wages for equal work. *Hein v. Or. Coll. of Educ.*, 718 F.2d 910, 916 (9th Cir. 1983).

"Once the plaintiff establishes a prima facie case, the burden of persuasion shifts to the employer to show that the wage disparity is permitted by one of the four statutory exceptions to the Equal Pay Act: '(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.'" *Maxwell*, 803 F.2d at 446 (quoting 29 U.S.C. § 2069(d)(1)). "These exceptions are affirmative defenses which the employer must plead and prove." *Kouba*, 691 F.2d at 875.[2]

---

[2] The plaintiff also alleges claims under Title VII and the California Fair Employment and Housing Act. "When a Title VII claimant contends that she has been denied equal pay for substantially equal work, ...Equal Pay Act standards apply." *Maxwell*, 803 F.2d at 446; *see also Kouba*, 691 F.2d at 875. For this reason, we do not separately discuss the plaintiff's Title VII claim. Because the parties do not assert that there are differences

In the district court, the County conceded that the plaintiff had established a prima facie case under the Equal Pay Act, but asserted the affirmative defense that the pay differential was "based on any other factor other than sex." Because the County sought summary judgment on the basis of an affirmative defense on which it would bear the burden of proof at trial, it must show at the summary-judgment stage that "no reasonable trier of fact" could fail to find that it had proved that defense. *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). However, the issue that prompted this interlocutory appeal is purely one of law: whether the district court's conclusion that prior salary alone can never be a "factor other than sex" is correct.

In *Kouba*, the employer, Allstate Insurance, "compute[d] the minimum salary guaranteed to a new sales agent on the basis of ability, education, experience, and prior salary." 691 F.2d at 874. As result of this practice, on average, female agents made less than male agents. *Id.* at 875. The plaintiff alleged that Allstate's "use of prior salary caused the wage differential," and that therefore the differential violated the Equal Pay Act. *Id.* Allstate argued that, to the extent its use of prior salary "caused the wage differential," "prior salary constitute[d] a factor other than sex." *Id.* The district court rejected this argument, reasoning that (1) because so many employers paid discriminatory salaries in the past, the court would presume that a female agent's prior salary was based on her gender unless the employer

---

between federal law and the California Fair Employment and Housing Act, we also do not separately discuss California law.

presented evidence to rebut that presumption, and (2) absent such a showing, prior salary is not a factor other than sex. *Id.*

On appeal, we rejected the district court's interpretation of the Equal Pay Act. *Id.* at 876. We held that "the Equal Pay Act does not impose a strict prohibition against the use of prior salary," even though an employer could "manipulate its use of prior salary to underpay female employees." *Id.* at 878. However, we did not hold that prior salary automatically qualifies as a factor other than sex. Rather, we held that an employer could maintain a pay differential based on prior salary (or based on any other facially gender-neutral factor) only if it showed that the factor "effectuate[s] some business policy" and that the employer "use[s] the factor reasonably in light of the employer's stated purpose as well as its other practices." *Id.* at 876–77. We then noted that Allstate had offered "two business reasons for its use of prior salary" and directed the district court to evaluate those reasons on remand. *Id.* at 877.

The County has offered four business reasons for using Standard Operation Procedure 1440, under which starting salaries are based primarily on prior salary: (1) the policy is objective, in the sense that no subjective opinions as to the new employee's value enters into the starting-salary calculus; (2) the policy encourages candidates to leave their current jobs for jobs at the County, because they will always receive a 5% pay increase over their current salary; (3) the policy prevents favoritism and ensures consistency in application; and (4) the policy is a judicious use of taxpayer dollars. But, the district court did not evaluate whether these reasons effectuate a business

policy or determine whether the County used prior salary "reasonably," as required by *Kouba*. Rather, the district court determined that, even though in *Kouba* we held that the Equal Pay Act does not impose a strict prohibition against the use of prior salary, *Kouba* does not preclude a finding that an employer may not use prior salary "as the *only* factor." *Rizo*, 2015 WL 9260587, at *7. According to the district court, "[t]he Ninth Circuit in *Kouba* was not called upon to, and did not, rule on the question of whether a salary differential based solely on prior earnings would violate the [Equal Pay Act], even if motivated by legitimate, non-discriminatory business reasons." *Id.* at *8. The district court then followed cases from other circuits holding that prior salary alone cannot justify a pay disparity. *Id.* at *8–9 (citing, among other cases, *Angove v. Williams-Sonoma, Inc.*, 70 Fed.Appx. 500, 508 (10th Cir. 2003); *Irby v. Bittick*, 44 F.3d 949, 954 (11th Cir. 1995); *Price v. Lockheed Space Operations Co.*, 856 F.2d 1503, 1506 (11th Cir. 1988); *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1570–71 (11th Cir. 1988)).

We do not agree with the district court that *Kouba* left open the question of whether a salary differential based solely on prior earnings violates the Equal Pay Act. To the contrary, that was exactly the question presented and answered in *Kouba*. The plaintiff in *Kouba* alleged that Allstate's "use of prior salary *caused the wage differential*." 691 F.2d at 875 (emphasis added). Although noting that Allstate "question[ed]" whether its use of prior salary caused the differential, we left the question of causation for the district court to resolve on remand. *Id.* at 875 n.5. It is true that Allstate, in setting an employee's pay,

considered factors other than prior salary, including "ability, education, [and] experience." *Id.* at 874. However, we did not attribute any significance to Allstate's use of these other factors. Rather, we focused on prior salary alone and determined that it would be a "factor other than sex" within the meaning of the Equal Pay Act, provided that Allstate could show on remand that its use of prior salary was reasonable and effectuated some business policy. *Id.* at 876–78.

The plaintiff and the EEOC, as amicus curiae, argue that prior salary alone cannot be a factor other than sex because when an employer sets pay by considering only its employees' prior salaries, it perpetuates existing pay disparities and thus undermines the purpose of the Equal Pay Act. But this argument was presented in *Kouba*, and the result we reached was to allow an employer to base a pay differential on prior salary so long as it showed that its use of prior salary effectuated some business policy and that the employer used the factor reasonably in light of its stated purpose and its other practices. *Id.* We did not draw any distinction between using prior salary "alone" and using it in combination with other factors.

Moreover, we do not see how the employer's consideration of other factors would prevent the perpetuation of existing pay disparities if, as we assumed in *Kouba* and as is the allegation here, prior salary is the only factor that *causes* the current disparity. For example, assume that a male and a female employee have the same education and number of years' experience as each other, but the male employee was paid a higher prior salary than the female employee. The current employer sets salary by

considering the employee's education, years of experience, and prior salary. Using these factors, the employer gives both employees the same salary credit for their identical education and experience, but the employer pays the male employee a higher salary than the female employee because of his higher prior salary. In this example, it is prior salary alone that accounts for the pay differential, even though the employer also considered other factors when setting pay. If prior salary alone is responsible for the disparity, requiring an employer to consider factors in addition to prior salary cannot resolve the problem that the EEOC and the plaintiff have identified.[3]

III.

Because *Kouba* holds that a pay differential based on the employer's use of prior salary can be "a differential based on any other factor other than sex," we vacate the district court's order denying the County's motion for summary judgment and remand for further proceedings. On remand, the district court must evaluate the four business reasons offered by the County and determine whether the County used prior salary "reasonably in light of [its] stated purpose[s] as well as its other practices." *Kouba*, 691 F.2d at 876–77. We emphasize that because these matters relate to the County's affirmative defense rather than to the

---

[3] We also note that, if an employer's use of prior salary alone were unacceptable under the Equal Pay Act, but the employer's mere consideration of some other factor in addition to prior salary (other than sex) cured the problem, then in the present case the County's pay structure would be lawful. That is because, in addition to prior salary, the County considers a new hire's education when setting pay, as reflected in the "stipend" that the plaintiff received for holding a master's degree.

elements of the plaintiff's claim, the County has the burden of persuasion. *See Maxwell*, 803 F.2d at 446. Thus, unlike in a typical case under Title VII involving the burden-shifting method of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), the plaintiff does not have to present evidence that the County's explanation for the pay differential is a pretext for intentional gender discrimination. Rather, it is up to the employer to persuade the trier of fact that its stated "factor other than sex" actually caused the salary differential, that the stated factor "effectuate[s] some business policy," and that the employer used the factor "reasonably in light of [its] stated purpose as well as its other practices." *Kouba*, 691 F.2d at 876–77. Of course, the plaintiff is free to introduce evidence of pretext (or any other matter that casts doubt on the employer's affirmative defense) if it chooses to do so. *Maxwell*, 803 F.2d at 446.

VACATED and REMANDED. Each party shall bear its own costs.

APPENDIX C

United States District Court, E.D. California.

Aileen RIZO, Plaintiff,
v.
Jim YOVINO, Fresno County Superintendent of Schools, Defendant.

CASE NO. 1:14-cv-0423-MJS
|
Signed December 17, 2015
|
Filed 12/18/2015

AMENDED ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (ECF NO. 12);

ISSUING CERTIFICATION FOR INTERLOCUTORY APPEAL; AND

VACATING JANUARY 12, 2016, TRIAL DATE

Michael J. Seng, UNITED STATES MAGISTRATE JUDGE

I. INTRODUCTION AND PROCEDURAL HISTORY

Plaintiff initiated this action on February 3, 2014, in the Fresno County Superior Court. She pled four

causes of action: (1) violation of the federal Equal Pay Act ("EPA"), 29 U.S.C. § 206(d); (2) sex discrimination under California Government Code § 12940; (3) sex discrimination under Title VII of the Civil Rights Act of 196, 42 U.S.C. § 2000e et seq. ("Title VII"); and (4) failure to prevent discrimination under California Government Code § 12940(k).

Defendant Jim Yovino, Fresno County Superintendent of Schools (erroneously sued as Fresno County Office of Education), removed this action to this Court on March 24, 2014, pursuant to 28 U.S.C. § 1441(c)(1)(A). The parties have consented to the undersigned's jurisdiction for all purposes. (*See* ECF Nos. 6, 7.)

This matter is before the Court on Defendant's motion for summary judgment. (ECF No. 12.) Plaintiff has filed an opposition. (ECF No. 14.) Defendant has filed a reply. (ECF No. 16.) On November 19, 2015, the parties filed supplemental briefs. (ECF Nos. 18, 19.) The Court heard argument on the motion on November 25, 2015. The motion is fully briefed and ready for disposition.

II. LEGAL STANDARDS

Any party may move for summary judgment, and the Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Wash. Mut. Inc. v. United States*, 636 F.3d 1207, 1216 (9th Cir. 2011). Each party's position, whether it be that a fact is disputed or undisputed, must be supported by (1) citing to particular parts of materials in the record, including but not limited to depositions,

documents, declarations, or discovery; or (2) showing that the materials cited do not establish the presence or absence of a genuine dispute or that the opposing party cannot produce admissible evidence to support the fact. Fed R. Civ. P. 56(c)(1). The Court may consider other materials in the record not cited to by the parties, but it is not required to do so. Fed. R. Civ. P. 56(c)(3); *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001).

Plaintiff bears the burden of proof at trial, and to prevail on summary judgment, she must affirmatively demonstrate that no reasonable trier of fact could find other than for her. *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). Defendants do not bear the burden of proof at trial and, in moving for summary judgment, they need only prove an absence of evidence to support Plaintiff's case. *In re Oracle Corp. Securities Litigation*, 627 F.3d 376, 387 (9th Cir. 2010).

In judging the evidence at the summary judgment stage, the Court may not make credibility determinations or weigh conflicting evidence, *Soremekun*, 509 F.3d at 984, and it must draw all inferences in the light most favorable to the nonmoving party and determine whether a genuine issue of material fact precludes entry of judgment, *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 942 (9th Cir. 2011).

III. UNDISPUTED FACTS[1]

A. Standard Operating Procedure No. 1440 ("SOP 1440")

1. Overview

The Fresno County Office of Education's ("FCOE") Management Salary Schedule sets forth the pay range for management-level employees. It consists of twelve levels. Each level has progressive steps within it. *See* Gunner Decl., Ex. G. Plaintiff and other math consultants were hired at Level 1. Level 1 has 10 steps, with pay ranging from $62,133 at Step 1 to $81,461 at Step 10. *Id.*

Prior to November 2004, Standard Operation Procedure No. 1038 ("SOP 1038") set forth the criteria for determining the proper step on the salary schedule for management-level employees "based on experience regarding the position awarded." Gabriel Dep., Ex. 15, ECF No. 14-3 at 89-91.

In November 2004, Standard Operation Procedure No. 1440 ("SOP 1440") was adopted to replace SOP 1038. Gabriel Dep., Ex. 15, ECF No. 14-3 at 99–100. Under SOP 1440, a new management employee's initial salary step is determined by verifying the daily rate of the employee's most recent position, adding a five-percent increase, and then placing that new employee on the next step that pays an amount at or above the five percent increase. Gabriel Decl. ¶ 4. Experience is no longer a factor in determining a candidate's placement on the salary schedule. *See* Gabriel Dep. at 49:2–6, Ex. 15. SOP 1440 also applies

---

[1] All facts set forth herein are found to be without material dispute unless noted otherwise.

to FCOE employees being promoted. Gabriel Dep. at 27:2–5.

Laurie Gabriel, Administrator of FCOE's Human Resource's Department, has worked for FCOE since 1998, first as the Director of Human Resources, then Senior Director, and most recently as the Administrator. Gabriel Decl. ¶ 2. Although the policy of basing a management employee's initial salary on verified prior earnings plus a five-percent increase was not written until November 2004, FCOE has applied that policy since at least 1998 when Gabriel was first hired. Gabriel Decl. ¶ 5; *see also* Gabriel Dep. at 50:17—51:2.

2. Hiring Pursuant to SOP 1440

When a job opening at FCOE is posted, the salary range is posted along with the job description. Dueck Dep. at 18:21–22. An applicant receives no explanation as to how his or her starting salary will be determined unless he or she asks. *See* Gabriel Dep. at 30:22—31:4. An applicant does not learn what his or her actual starting salary will be until an offer is made. Gabriel Dep. at 30:10—31:4; Dueck Dep. at 18:6–14.

Defendant Jim Yovino, first hired on July 31, 2006 as a Deputy Superintendent, is now the Fresno County Superintendent for FCOE. Yovino Decl. ¶ 3. As Superintendent, Yovino's responsibilities include determining how salaries are set. Yovino Decl. ¶ 3. Yovino has hired or promoted a number of employees pursuant to SOP 1440, including Eric Crantz, Tina Nakasian, and Mike Chamberlain, all of whom work

in Plaintiff's department and in the same position as Plaintiff[2]:

Tina Nakasian, a female, was hired on July 23, 2012, and placed on Step 8 of the management salary schedule pursuant to SOP 1440. Yovino Decl. ¶ 6c.

Eric Crantz, a male, was "on loan" from another Fresno County school district, Kingsburg Elementary School District, in 2009. Yovino Decl. ¶ 6e. He was being paid in accordance with that school district's salary schedule while performing services for FCOE. Yovino Decl. ¶ 6e. In July 2012, Crantz was hired as a permanent employee and placed on Step 9 of the management salary schedule in accordance with SOP 1440. Yovino Decl. ¶ 6e; Crantz Dep. at 15:19–22, Ex. 19. Within a day after signing his hiring contract, Crantz noticed that the salary information on it incorrectly showed him earning more than he was entitled to be paid. Crantz Dep. at 22:1–11. Within a day of bringing the error to the attention of the human resources department, Crantz signed a new contract with the correct salary information. Crantz Dep. at 22:15–20, 24:4–25.

Mike Chamberlain, a male, was hired on July 23, 2012, and placed on Step 7 of the salary schedule. Yovino Decl. ¶ 6d. When an offer was made to Chamberlain, he was unaware that salaries were determined by application of SOP 1440, and he tried to negotiate a higher salary by pointing out relevant contract and consultant work he did in addition to his

---

[2] A fourth individual, Carl Veater, also worked as a math consultant in Plaintiff's department. He was hired on December 22, 2003, at Step 7. Gabriel Decl., Ex. C, ECF No. 12-6 at 3.

primary job. Chamberlain Dep. at 16:14–23. Though he felt that his concerns were listened to, *see* Chamberlain Dep. at 17:16–25, his starting salary remained as determined under SOP 1440. Yovino Decl. ¶ 6d. Chamberlain's starting salary was based on a contract he had entered into with Caruthers Unified School District commencing on July 1, 2012, even though he had not actually begun work under that contract. Yovino Decl. ¶ 7. A day or two after signing his initial hiring contract, Chamberlain signed a new contract because the initial contract had incorrect salary information; as a result Chamberlain's salary was adjusted down. Chamberlain Dep. at 28: 3–19.

Since July 1, 2005, when Yovino's predecessor was hired, 9 female administrators were hired or promoted into management positions and placed on a higher step than Yovino's and his predecessor's initial placements. Yovino Decl. ¶ 9. During the same time frame, three male administrators were hired or promoted into management positions and placed on a step higher step than Yovino's and his predecessor's initial placements. Yovino Decl. ¶ 9.

3. Deviations from SOP 1440

There have been times when Defendant has deviated from the standards set forth in SOP 1440. When Elaine Sotiropoulous was hired as a management employee in January 2000, there were three different versions of the management salary schedule in effect. Yovino Decl. ¶ 8. Sotiropoulous was placed on Step 3, which may have been one step higher than she should have been placed under SOP 1440. Yovino Decl. ¶ 8.

In October 2008, Mark Hammons was promoted from an employee in the classified bargaining unit (a 12-month position) to a management position (an 11-month position). Yovino Decl. ¶ 7. Under SOP 1440, Hammons should have been placed at Step 1, but Yovino approved placement at Step 2 because of the fewer days Hammons would be working; otherwise, Hammons's promotion would have resulted in a pay cut. Yovino Decl. ¶ 7; Gabriel Decl. ¶ 6.

B. Plaintiff's Application and Employment with FCOE

Plaintiff, a female, has a Bachelor of Science in Mathematics Education, a Master's degree in Educational Technology, and a Master's degree in Mathematics Education. Pl. Dep. at 8:14–24, 9:2–14. Her work experience includes teaching high school math, physics and art at a public school, *id.* at 10:12–22; working as a math department head and then math curriculum designer at a publishing company, *id.* at 11:2–19; and teaching math at a public school, *id.* at 12:6–15, 15:4–10.

In September 2009, Plaintiff applied for a position as a math consultant in the Science, Technology, Engineering and Mathematics (STEM) Department at FCOE. Yovino Decl. ¶ 11; Pl. Decl. ¶ 2; Pl. Dep., Attach. As part of her application, Plaintiff submitted proof of her earnings at her previous position. Pl.'s Dep. at 21:1–4.

Following two interviews, Lori Hamada offered Plaintiff the math consultant position in October 2009 by with a starting salary at Step 1 of the salary schedule pursuant to SOP 1440. Pl.'s Dep. at 20:5–7, 27:2–5; Yovino Decl. ¶ 11. Plaintiff understood that

her salary was comparable to a person with as much experience as she had. Pl. Dep. at 24:19–22.

Plaintiff's last position paid her $50,630 plus $1,200 for her Master's degree for 206 days. Pl. Dep. at 22:7–12. Plaintiff's starting salary at FCOE was $62,133, plus a master's degree stipend of $600 for 196 days of work. *Id.* at 22:22:25, 27:2–5. Plaintiff was paid $11,500 more than her previous salary for 20 fewer days of work. Plaintiff remains employed at FCOE and has received a raise each year. *Id.* at 95:4–6.

C. FCOE Math Consultants

The record is unclear as to how many math consultants were in Plaintiff's group at the time that she filed her complaint. Defendant asserts that there were five: Plaintiff (female), Tina Nakasian (female), Eric Crantz (male), Mike Chamberlain (male), and Carl Veater (male). Per the Joint Statement of Undisputed Facts, Tina Nakasian was hired on July 23, 2012, before Plaintiff filed her complaint. *See* ECF No. 12-17 at 2 ¶ 13. Plaintiff's, however, maintains that there were only four math consultants when she filed her complaint and that she was the only female. Pl. Decl. ¶¶ 5, 8.[3]

D. Complaint to Human Resources

On July 31, 2012, Plaintiff was having lunch with several colleagues when she was informed by Eric Crantz, who had just been hired, that he had been placed on Step 9 of the salary schedule. Pl. Decl. ¶ 6.

---

[3] It is undisputed that Tina Nakasian, a woman, works in the same department and in the same position as Plaintiff, *see* J. Statement of Undisputed Facts, ECF No. 12-17 at 3, *see also* Pl. Dep. at 38:4–9.

On August 7, 2012, Plaintiff complained to Gabriel about the pay disparity between herself and her male colleagues. Pl. Decl. ¶ 7; Gabriel Decl., Ex. D. Based on Plaintiff's concerns, Gabriel requested that reports be compiled on management employees as of August 2012 who held the same or similar classifications as Plaintiff. Gabriel Decl. ¶ 9. The results demonstrated to Defendant that there was no significant difference between men and women insofar as their initial placement on the salary scale.[4] *Id.*

Based on the results of the reports, on August 31, 2012, Gabriel wrote a letter to Plaintiff, explaining that Plaintiff's placement on the salary schedule was consistent with SOP 1440 and not discriminatory. Gabriel Decl. ¶ 10, Ex. D. Gabriel also informed Plaintiff that a review of current management employees hired over the past 25 years demonstrated that consistent application of SOP 1440 had placed more females higher on the salary schedules than males in the same or similar position in the same department.[5] *Id.*

---

[4] The same reports were prepared twice more, in January 2013 and June 2014, with similar results. Gabriel Decl. ¶ 9.

[5] Several days after filing the complaint, Plaintiff's supervisor, Jon Dueck, remarked in front of others that because FCOE was applying for a grant whose purpose was to serve women and minorities, Plaintiff should write the grant. Pl. Decl. ¶ 9. Dueck said, "You're a girl and you're a minority, why don't you write that grant." Pl. Decl. ¶ 9. Dueck laughed about the comment with another male co-worker. Pl. Decl. ¶ 9. Even though Plaintiff found the comment to be inappropriate, she never discussed it with Dueck never reported the incident to human resources. Dueck Dep. at 26:3–5; Pl. Dep. at 81:17–19, 88:18–20. Defendant moves, in part, for summary judgment on Plaintiff's fourth claim

IV. EVIDENTIARY MATTERS

A. Plaintiff's Request for Judicial Notice

Plaintiff asks the Court to take judicial notice of the United States Department of Labor Bureau of Labor Statistics' 2014 survey results of earnings of male and female employees by occupation, which she attached to her request and is also available at http://www.bls.gov/cps/cpsaat39.pdf. (ECF No. 14-5.) Though Plaintiff does not state why she seeks judicial notice of this document in her request, her opposition refers to it as evidence of a pay disparity between male and female educators. Opp'n at 21–22.

Defendant objects to this request on the ground that Plaintiff fails to authenticate or lay a foundation for the document or show how the "facts" contained therein are capable of accurate and ready determination. Defendant also objects that the document reflects wages nationwide, not wages of male and female educators in California and Arizona, the states where the salaries at issue here were determined.

The Court may take judicial notice of matters that are either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid.

– failure to prevent discrimination – on the ground that it could not have prevented discrimination with regard to Jon Dueck's statements because Plaintiff never complained about the statements. The opposition, however, clarifies that Plaintiff's fourth claim is actually premised on Defendant's failure to discontinue application of SOP 1440 following Plaintiff's complaint. It is not based on Jon Dueck's statements.

201(b). Under Federal Rule of Evidence 901, evidence that a public record or report is from the public office where items of that nature are kept satisfies the requirement that admitted evidence be authenticated. *Premier Nutrition, Inc. v. Organic Food Bar, Inc.*, 2008 WL 1913163, at *5 (C.D. Cal. Mar. 27, 2008) aff'd, 327 Fed. Appx. 723 (9th Cir. 2009). The printout also bears "distinctive characteristics" of the agencies' websites. *Haines v. Home Depot U.S.A., Inc.*, 2012 WL 1143648, at *7 (E.D. Cal. Apr. 4, 2012) ("courts have considered the 'distinctive characteristics' of the website in determining whether a document is sufficiently authenticated." (Citations omitted)).

Rule 902 allows for the self-authentication of certain documents, including official publications: "Books, pamphlets, or other publications purporting to be issued by public authority." Fed. R. Evid. 902(5); *Paralyzed Veterans of Am. v. McPherson*, 2008 WL 4183981, at *7 (N.D. Cal. Sept. 9, 2008). Federal courts routinely consider records from government websites to be self-authenticating. *See, e.g., Estate of Gonzales v. Hickman*, 2007 WL 3237727, at *2 (C.D. Cal. May 30, 2007); *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 551 (D. Md. 2007) ("Given the frequency with which official publications from government agencies are relevant to litigation and the increasing tendency for such agencies to have their own websites, Rule 902(5) provides a very useful method of authenticating these publications. When combined with the public records exception to the hearsay rule, Rule 803(8), these official publications posted on government agency websites should be admitted into evidence easily."); *U.S. ex rel. Parikh v. Premera Blue Cross*, 2006 WL 2841998, at *4 (W.D.

Wash. Sept. 29, 2006) (considering documents that can be found on Government websites, such as GAO Reports and Health and Human Services' Reports self-authenticating).

Here, the printout from Bureau of Labor Statistics is an official United States Government publication that is accessible via the government entity's website. The Court therefore deems it an "Official Publication" under Rule 902(5) and considers it properly authenticated. As it relates to this case, the survey results establish that, on average and in the United States as a whole, male teachers out-earn their female counterparts.[6] The Court will take judicial notice of this fact.

B. Defendant's Objections

Defendant also objects that Plaintiff has in numerous places mischaracterized the record or deposition testimony and made arguments premised on inadmissible hearsay. The Court has independently reviewed and evaluated the deposition transcripts and other evidence and does not rely on either party's characterization of the evidence in

---

[6] During oral arguments, defense counsel disputed that this survey reflected a pay disparity between male and female educators. The Court finds otherwise. The document demonstrates that the median weekly earnings of full-time workers in the "Education, training, and library occupations" are $1,140 for men and $897 for women. A pay disparity also is shown for each of the subjections thereunder, which include post-secondary teachers ($1,409 for men and $1,143 for women); secondary school teachers ($1,108 for men and $984 for women); and elementary and middle school teachers ($1,096 for men and $956 for women).

reaching its decision. Accordingly, the objections are moot and overruled on that ground.

V. DISCUSSION

A. The Equal Pay Act

The Equal Pay Act ("EPA") makes it unlawful for employers to pay employees of one sex less than employees of the opposite sex "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." 29 U.S.C. § 206(d)(1).

The Ninth Circuit employs a burden-shifting framework in evaluating EPA claims. The plaintiff initially has the burden of establishing a prima facie case by demonstrating that employees of the opposite sex were paid different wages for work that was "substantially equal." *See Stanley v. Univ. of S. Cal.*, 178 F.3d 1069, 1073–74 (9th Cir. 1999). The "substantially equal" inquiry involves two discrete steps. First, the plaintiff must show that the jobs being compared "have a common core of tasks." *Id.* at 1074 (internal quotation marks omitted). If the plaintiff makes this showing, "the court must then determine whether any additional tasks, incumbent on one job but not the other, make the two jobs 'substantially different.'" If the jobs entail substantial differences in skill, effort, or responsibility, or if the jobs are not performed under similar working conditions, the claim must fail. *See Forsberg v. Pac. Nw. Bell Tel. Co.*, 840 F.2d 1409, 1414 (9th Cir. 1988) (explaining that each criterion must be met).

Once the plaintiff establishes a prima facie case, the burden shifts to the employer to demonstrate that the wage disparity is attributable to one of four statutory

exceptions: "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." 29 U.S.C. § 206(d)(1). "These exceptions are affirmative defenses which the employer must plead and prove." *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir. 1986) (internal quotation marks omitted). If the employer establishes one of the affirmative defenses, the burden shifts back to the plaintiff to show that "the employer's proffered nondiscriminatory reason is a pretext for discrimination." *Stanley*, 178 F.3d at 1076 (internal quotation marks omitted).

1. Plaintiff's Prima Facie Case

In making her prima facie case under the EPA, Plaintiff asserts that she is a woman who was started at a lower step on the salary schedule than her male coworkers despite being hired for substantially equal work. The evidence before the Court confirms that Plaintiff started at Step 1 on the management salary schedule, Mike Chamberlain started at Step 7, Carl Veater started at Step 7, and Eric Crantz started at Step 9. Plaintiff omits mention of the second female in this group, Tina Nakasian, who started at Step 8 and thus was higher on the salary schedule than two of the three males. However, "[t]he existence of a female in the higher classification does not ... defeat the plaintiff's prima facie showing of wage discrimination." *E.E.O.C. v. Maricopa County Comm. College Dist.*, 736 F.2d 510, 515 (9th Cir. 1984) (internal citation omitted). "[T]he proper test for establishing a prima facie case in a professional setting ... is whether the plaintiff is receiving lower wages than the average of wages paid to all employees

of the opposite sex performing substantially equal work and similarly situated with respect to any other factors, such as seniority, that affect the wage scale." *See Hein v. Oregon College of Educ.*, 718 F.2d 910, 916 (9th Cir. 1983). The Court finds, and Defendant does not dispute, that Plaintiff has met her burden here. She has established a prima facie case.

2. Defendant's Affirmative Defense: Prior Salary

The burden now shifts to Defendant to show that the wage disparity caused by SOP 1440 derives from a system which falls within one of EPA's four exceptions. Defendant's affirmative defense rests on the fourth catch-all provision, i.e., that the salary difference results from a factor other than sex, namely application of a facially-neutral policy, SOP 1440.

Salary differences that result from unequal starting salaries "do not violate the Equal Pay Act if the original salary can be justified by one of the four exceptions to the Equal Pay Act." *Hein*, 718 F.2d at 920. Defendant asserts that FCOE's policy qualifies as such because it determines an applicant's starting salary solely by reference to his or her prior salary and does so for four business reasons: (1) SOP 1440 is objective; (2) it is effective in attracting quality new employees; (3) it prevents favoritism and ensures consistency; and (4) it is a judicious use of taxpayer dollars.

Plaintiff argues, however, that an employer's reliance *solely* on prior salary in setting starting salaries is prohibited by the EPA. Defendant counters that the Ninth Circuit has unequivocally found that the EPA allows an employer's consideration of prior

salary. Both parties rely on *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 878 (9th Cir. 1982). There, the Ninth Circuit held that the EPA does not impose a per se prohibition against consideration of prior salary in setting a new employee's salary. But there, prior salary was but one of several factors considered by the employer.

This case thus obligates this Court to determine if the Ninth Circuit's approval of the use of prior salary as one factor extends to condone its use as the *only* factor. To address this issue and better understand the parties' arguments as well as this Court's ultimate determination, it is helpful to review the history and context of *Kouba* as well as subsequent judicial comment on it. In *Kouba*, Plaintiff represented a class of female insurance agents who accused Allstate of unlawful sex discrimination for using prior salary as one of several factors in determining an employee's starting pay. The district court entered partial summary judgment for Plaintiff. It held in essence that the EPA prohibited consideration of prior salary absent an affirmative showing that the employer had attempted to "ascertain[ ] whether or not the previous salary was itself based upon factors other than sex." *Kouba v. Allstate Ins. Co.*, 523 F. Supp. 148, 163 (E.D. Cal. 1981). The district court was concerned that Allstate's policy would perpetuate historic sex discrimination. It therefore sought to provide judicial guidance as to how to limit such an effect: "Although the issue is not without its difficulties, it thus appears to me that as a matter of law an employer may not set a salary schedule which differentiates between its male and female employees doing the exact same job, based upon the immediate past salaries paid to the

men and women, unless it can demonstrate that it has assessed the previous salaries and determined that they themselves were set on "other factors other than sex." " The district court went on to suggest that a prospective employer could evaluate the previous salaries by contacting the previous employer and inquiring about its hiring practices. *Id.* at 162–63, 163 n.15.

The Ninth Circuit rejected that approach. In reversing and remanding, it held that "the Equal Pay Act does not impose a strict prohibition against the use of prior salary." *Kouba*, 691 F.2d at 876. While the appellate court "share[d] the district court's fear that an employer might manipulate its use of prior salary to underpay female employees," it observed that a court's ability to protect against such abuse was "somewhat limited" since the Equal Pay Act "entrusts employers, not judges, with making the often uncertain decision of how to accomplish business objectives." *Id.* A pragmatic standard, "which protects against abuse yet accommodates employer discretion, is that the employer must use the [prior salary] factor reasonably in light of the employer's stated purpose as well as its other practices." *Id.* at 876–77. The Ninth Circuit recognized the possibility that a business reason could prove to be a pretext for discrimination and that the risk of that is "especially great with a factor like prior salary which can easily be used to capitalize on the unfairly low salaries historically paid to women." *Id.* at 876. Nonetheless, it held that a violation of the EPA will not be found if the prior salary was "use[d] reasonably in light of the employer's stated purpose as well as its other practices." *Id.*

As noted, Plaintiff seeks to limit *Kouba*'s import to those cases where prior salary is but one of several factors considered by an employer. Defendant, on the other hand, argues that there is no material difference between this case and *Kouba*. It urges the Court to find that under *Kouba* consideration of prior salary, whether alone or in combination with other factors, is permissible so long as its use is reasonably related to an employer's legitimate business reasons.

The Ninth Circuit in *Kouba* was not called upon to, and did not, rule on the question of whether a salary differential based solely on prior earnings would violate the EPA, even if motivated by legitimate, non-discriminatory business reasons. Courts who have considered this issue are split. There are those who have held that an employer's EPA defense may not be based solely on prior salary. *See, e.g., Irby v. Bittick*, 830 F. Supp. 632, 636 (M.D. GA Sept. 8, 1993) ("If prior salary alone were a justification, the exception would swallow up the rule and inequality in pay among genders would be perpetuated."), aff'd on appeal, 44 F.3d 949, 954 (11th Cir. 1995) ("We have consistently held that 'prior salary alone cannot justify pay disparity' under the EPA.") *Angove v Williams-Sonoma, Inc.*, 70 Fed. Appx. 500, 508 (10th Cir. 2003) (citing *Irby* in holding that "[t]he EPA only precludes an employer from relying *solely* upon a prior salary to justify pay disparity.") (emphasis in original). *See also Price v. Lockheed Space Operations Co.*, 856 F.2d 1503, 1506 (11th Cir. 1988) ("*Kouba* does not stand for the proposition that prior salary alone can justify pay disparity. Rather, the Ninth Circuit held that 'the Equal Pay Act does not impose a strict prohibition against the use of prior salary.'"); *Lewis v. Smith*, 255

F. Supp. 2d 1054, 1063 (D. Ariz. Apr. 4, 2003) (holding that "merely relying on the prior salary of an employee, without analyzing the market value of the employer's [sic] skills, is insufficient to establish an equal pay defense.") (internal citations omitted); *Wachter-Young v. Ohio Cas. Group*, 236 F. Supp. 2d 1157, 1164 (D. Or. May 14, 2002) ("While an employer may not overcome the burden of proof on the affirmative defense of relying on 'any other factor other than sex' by resting on prior pay alone...there is no prohibition on utilizing prior pay as part of a mixed-motive.") (citing *Irby*, 44 F.3d at 954); *Wyant v. Burlington Northern Santa Fe R.R.*, 210 F. Supp. 2d 1263, 1291 (N.D. Ala. Jun. 5, 2002) ("[Defendant]'s reference to [Plaintiff]'s prior salary in setting current salary alone is not a legitimate factor other than sex.").

Other courts, however, have expressly held that an employer may rely on prior salary alone. *See, e.g.*, *Wernsing v. Dep't of Human Srvcs, State of Illinois*, 427 F.3d 466 (7th Cir. 2005) (rejecting the plaintiff's argument that use of prior salary alone violates the EPA); *Taylor v. White*, 321 F.3d 710, 720 (8th Cir. 2003) ("[W]e believe a case-by case analysis of reliance on prior salary or salary retention policies with careful attention to alleged gender-based practices preserves the business freedoms Congress intended to protect when it adopted the catch-all "factor other than sex" affirmative defense."); *Groussman v. Respiratory Home Care*, 1985 WL 5621, at *X (C.D. Cal. 1985) (finding that employer satisfied its burden under the EPA by demonstrating that the salary differentials were based on prior salary alone).

The Eleventh Circuit's analysis in *Glenn v. General Motors Corp.*, 841 F.2d 1567 (11th Cir. 1988), is

helpful. In that case, GM claimed to have "a longstanding, unwritten, corporate-wide policy against requiring an employee to take a cut in pay when transferring to salaried positions" from hourly positions. 841 F.2d at 1570. As a result, the female plaintiffs in that case were paid less than their male comparators who had transferred from higher-paying hourly jobs in the company. The Eleventh Circuit rejected this policy as insufficient to establish a "factor other than sex" for the affirmative defense. It reviewed the legislative history of the Equal Pay Act, finding that it "indicates that the 'factor other than sex' exception applies when the disparity results from unique characteristics of the same job; from an individual's experience, training, or ability; or from *special exigent circumstances* connected with the business." *Id.* at 1571 (emphasis added). "[P]rior salary alone cannot justify pay disparity." *Id.* In a footnote, the *Glenn* court addressed *Kouba*:

> Contrary to GM's gloss, *Kouba v. Allstate Ins. Co.*, 691 F.2d 873 (9th Cir. 1982), does not stand for the proposition that prior salary alone can justify pay disparity. In *Kouba*, the Ninth Circuit held that "the Equal Pay Act does not impose a strict prohibition against the use of prior salary." *Id.* at 878. The Ninth Circuit added that "while we share the district court's fear that an employer might manipulate its use of prior salary to underpay female employees, the [district] court must find that the business reasons given by [defendant] Allstate do not reasonably explain its use of the factor before finding a violation of the Act." *Id.* Allstate had claimed that it used prior salary to predict a new employee's performance

> as a sales agent. *Id.* The Ninth Circuit held that strict relevant considerations needed to be evaluated on remand to decide whether Allstate could rely on prior salary. ***Kouba*** is consistent with the present case because the Ninth Circuit would permit use of prior salary where the prior job resembled the sales agent position and where Allstate relied on other available predictors. In the present case, GM does not argue that the males' hourly wages serve to predict that males will be better follow-ups than the female appellees. Nor does the evidence in the record as a whole support that GM could resort to any other factor than the prior salary to justify the pay disparity.

841 F.3d at 1571 n.9.

This Court then is faced with the task of passing on the propriety, under the EPA, of Defendant's application of SOP 1440. It must do so within the framework of the foregoing divergent legal authorities and within a factual scenario that leads to the finding — undisputed by Plaintiff — that SOP 1440 was, at least on its face, designed to be objective and gender-neutral. Considering all of the above, the Court concludes that, notwithstanding its non-discriminatory purpose, SOP 1440 necessarily and unavoidably conflicts with the EPA.

In doing so, this Court will follow the Tenth and Eleventh Circuits and find that a pay structure based exclusively on prior wages is so inherently fraught with the risk – indeed, here, the virtual certainty— that it will perpetuate a discriminatory wage disparity between men and women that it cannot stand, even if

motivated by a legitimate non-discriminatory business purpose. The evidence in this record reflects an across-the-board pay disparity between male and female educators nationwide. Lateral hiring salary plans such as SOP 1440 which do not look beyond prior salary will perpetrate that disparity. Defendant's application of SOP 1440 "contravene[s] Congress' intent and perpetuate[s] the traditionally unequal salaries paid to women for equal work." *Price*, 856 F.2d at 1506; *see also Corning Glass Works v. Brennan*, 417 U.S. 188, 205 (1974) (A pay differential which "ar[ises] simply because men would not work at the low rates paid women...[and reflect][s] a job market in which [the employer] could pay women less than men for the same work" is not based on a cognizable factor other than sex under the Equal Pay Act.). To say that an otherwise unjustified pay differential between women and men performing equal work is based on a factor other than sex because it reflects historical market forces which value the equal work of one sex over the other perpetuates the market's sex-based subjective assumptions and stereotyped misconceptions Congress passed the Equal Pay Act to eradicate. *Corning Glass*, 417 U.S. at 210–11.

Defendant has not met his burden to assert as an affirmative defense a qualifying justification for the wage differential present here. Accordingly, summary judgment will be denied.

B. Title VII

Title VII makes it "an unlawful employment practice for an employer" to "discriminate against any individual with respect to" the "terms, conditions, or privileges of employment, because of such individual's

race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(a).

The Court begins its analysis by highlighting the appropriate legal standard applicable to Plaintiff's Title VII claim since the parties' briefs demonstrate confusion. As a starting point, EPA and Title VII claims overlap since both statutes render it unlawful to differentiate "in wages on the basis of a person's sex." *Lewis*, 255 F. Supp. 2d at 1059 (quoting *Maxwell*, 803 F.2d at 446). There are, however, important differences between the two statutory schemes. Title VII, for example, places a broader prohibition on discriminatory wages than the EPA and, unlike the EPA, permits a plaintiff to pursue a claim without showing substantial equality of jobs with different pay rates. *County of Washington v. Gunther*, 452 U.S. 161, 169–71, 179–80 (1981); *Lewis*, 255 F. Supp. 2d at 1060–61. Also, whereas the EPA "creates a type of strict liability; no intent to discriminate need be shown," *Maxwell*, 803 F.2d at 446, a claim brought pursuant to Title VII typically involves a showing of discriminatory intent. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253–54 (1981).

The standard applicable to a plaintiff's Title VII claim depends on the theory upon which it is based. When a plaintiff asserts a Title VII claim that is premised on unequal pay for equal work, it is analyzed under EPA standards. *Maxwell*, 803 F.2d at 446; *Gunther v. Washington County*, 623 F.2d 1303, 1318 (9th Cir. 1979) ("When a discrimination claim is based on a theory that the plaintiffs are denied equal pay for equal work, Equal Pay Act standards are applicable.") (supplemental opinion denying hearing), aff'd, *County of Washington v. Gunther*, 452 U.S. 161 (1981). Of

course, a Title VII cause of action can also exist outside the scope of the EPA. *Gunther*, 452 U.S. at 181; *Spaulding v. University of Washington*, 740 F.2d 686, 699–700 (9th Cir. 1984) overruled on other grounds, *Atonio v. Wards Cove Packing Co., Inc.*, 810 F.2d 1477 (9th Cir. 1987); *Lewis*, 255 F. Supp. 2d at 1060. Thus, "[w]hen a claim of discrimination is *not* based on an equal work theory, it must be analyzed separately under Title VII." *Maxwell*, 803 F.2d at 446 (emphasis added).

Here, Plaintiff's claim is premised on a theory of unequal pay for equal work. *See* Pl.'s Opp'n at 1 ("[A] discriminatory pay claim under Title VII and FEHA is analyzed the same way as a claim under the Equal Pay Act"); Def.'s Mot. Summ. J. at 11 (Plaintiff's EPA, Title VII and FEHA claims "alleg[e] essentially the same thing: Plaintiff was paid less than male math Consultants for equivalent work"). Accordingly, EPA standards apply to Plaintiff's Title VII claim. *Maxwell*, 803 F.2d at 446. "[T]he dispositive issue[, therefore,] is whether [Defendant] established a defense to [Plaintiff]'s claims. If [Defendant] can establish a defense, it prevails; if it cannot, [Plaintiff] prevails." *Id.*

As discussed *supra*, Defendant cannot establish an affirmative defense under the EPA based on its use of prior salary alone. Since Defendant has not asserted any other viable defense, its motion for summary judgment must be denied.

C. FEHA: Wage Discrimination

Under California's Fair Employment and Housing Act ("FEHA"), it is illegal for an employer to discriminate against an employee "in compensation or

in terms, conditions, or privileges of employment" on the basis of sex. Cal. Gov't Code Code § 12940(a). "Because state and federal employment discrimination laws are similar, California courts look to federal precedent when interpreting FEHA." *Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 354 (2000); *see also Metoyer v. Chassman*, 504 F.3d 919, 941 (9th Cir. 2007) ("California courts apply the Title VII framework to claims brought under FEHA.") (citing *Guz*, 24 Cal. 4th at 354).

Under this framework, Defendant's motion for summary judgment on the FEHA claim also will be denied.

D. FEHA: Failure to Prevent Discrimination

California Government Code § 12940(k) provides that it is unlawful "for an employer...to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring" in the workplace. "When a plaintiff seeks to recover damages based on a claim of failure to prevent discrimination or harassment [ ]he must show three essential elements: 1) plaintiff was subjected to discrimination, harassment or retaliation; 2) defendant failed to take all reasonable steps to prevent discrimination, harassment or retaliation; and 3) this failure caused plaintiff to suffer injury, damage, loss or harm." *Lelaind v. City and County of San Francisco*, 576 F. Supp. 2d 1079, 1103 (N.D. Cal. 2008). "One such reasonable step, and one that is required in order to ensure a discrimination-free work environment, is a prompt investigation of [a] discrimination claim." *California Fair Employment and Housing*

Commission v. Gemini Aluminum Corporation, 122 Cal. App. 4th 1004, 1024 (2004) (citing *Northrop Grumman Corp. v. Workers' Comp. Appeals Bd.*, 103 Cal. App. 4th 1021, 1035 (2002)).

This claim is premised on Defendant's conclusion that SOP 1440 is not discriminatory following its investigation of Plaintiff's complaint to human resources. Defendant moves for summary judgment on the ground that "[t]he fact that FCOE determined SOP 1440 did not discriminate against women and that Plaintiff was treated entirely consistent with the policy by no means equates to failure to prevent discrimination." Def.'s Mot. Summ. J. at 12. Defendant's argument is conclusory and unsupported by citation to authority. Absent legal authority for doing so, this Court can not absolve an employer of liability for failing to prevent discrimination simply because it investigated a complaint of a discriminatory policy. Summary judgment will be denied.

VI. CERTIFICATION FOR INTERLOCUTORY APPEAL

1. Legal Standard

The final judgment rule ordinarily provides that courts of appeal shall have jurisdiction only over "final decisions of the district courts of the United States." 28 U.S.C. § 1291. However, "[w]hen a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in

writing in such order." 28 U.S.C. § 1292(b). "The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order." *Id.* "Certification under § 1292(b) requires the district court to expressly find in writing that all three § 1292(b) requirements are met." *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010). "Section 1292(b) is a departure from the normal rule that only final judgments are appealable, and therefore must be construed narrowly." *James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1067 n.6 (9th Cir. 2002). To that end, "section 1292(b) is to be applied sparingly and only in exceptional cases." *In re Cement Antitrust Litig. (MDL No. 296)*, 673 F.2d 1020, 1027 (9th Cir. 1981), aff'd sub nom. *Arizona v. Ash Grove Cement Co.*, 459 U.S. 1190 (1983).

2. Discussion

In order to certify an order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), the court must find that an interlocutory order: (1) involves a controlling question of law; (2) there is substantial ground for difference of opinion on that question; and (3) a resolution of the legal issue will materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b). "A question of law may be deemed 'controlling' if its resolution is quite likely to affect the further course of the litigation, even if not certain to do so." *Sokaogon Gaming Enter. v. Tushie-Montgomery Assoc.*, 86 F.3d 656, 659 (7th Cir. 1996) (citations omitted); *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011). An issue of law may also be considered "controlling" if reversal of an order would terminate the action. *Genentech, Inc. v.*

Novo Nordisk A/S, 907 F. Supp. 97, 99 (S.D.N.Y. 1995).

The controlling issue in this case is: Whether, as a matter of law under the EPA, an employer subject to the EPA may rely on prior salary alone when setting an employee's starting salary? If the answer to this question is "yes", i.e., contrary to this Court's conclusion above, it likely will result in a grant of Defendant's motion for summary judgment and a finding in favor of Defendant on liability on all claims. As such, the first criterion for certification is satisfied.

The second factor requires a showing that there is a "substantial ground for difference of opinion." 28 U.S.C. § 1292(b). As noted in *Couch v. Telescope, Inc.*, 611 F.3d 629, 633 (9th Cir. 2010):

> Courts traditionally will find that a substantial ground for difference of opinion exists where "the circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented." 3 Federal Procedure, Lawyers Edition § 3:212 (2010) (footnotes omitted). However, "just because a court is the first to rule on a particular question or just because counsel contends that one precedent rather than another is controlling does not mean there is such a substantial difference of opinion as will support an interlocutory appeal." *Id.* (footnotes omitted).

As discussed *supra*, there is substantial difference of opinion on the question presented. Specifically, the Tenth and Eleventh Circuits have held that an

employer may not rely solely on prior salary. On the other hand, the Seventh and Eighth Circuits have held that an employer is not barred from relying on prior salary alone. Put simply, there is a distinct split in authority on the pure legal question presented by this case and in this certification request. The question is one of first impression in the Ninth Circuit. Hence, the second factor also is satisfied.

The third factor requires that resolution of the legal issue materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b). As the undersigned noted in the December 7, 2015, Order for additional briefing, it appears that the Court's denial of Defendant's motion for summary judgment effectively resolves the issue of liability on Plaintiff's claims in her favor. If, however, the Ninth Circuit determines that Defendant may rely solely on prior salary in determining an applicant's starting salary, Defendant may likely avoid liability altogether and see the litigation terminated in its favor.

For these reasons, the Court finds it prudent to certify this action for interlocutory appeal.

VII. CONCLUSION

Based on the foregoing, IT IS HEREBY ORDERED that:

1. Defendant's June 10, 2015, motion for summary judgment (ECF No. 12) is DENIED;
2. The Court CERTIFIES pursuant to 28 U.S.C. § 1292(b) that the legal issue identified in this order – namely, whether, as a matter of law under the EPA, 29 U.S.C. § 206(d), an employer subject to the EPA may rely on prior salary alone when setting an employee's starting

salary—is appropriate for interlocutory appeal. The issue presented "involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal from the order may materially advance the ultimate termination of the litigation"; and

3. The January 12, 2016, trial in this matter is hereby VACATED.

IT IS SO ORDERED.

APPENDIX D

Aileen RIZO, Plaintiff–Appellee,

v.

Jim YOVINO, Fresno County Superintendent of Schools, Erroneously Sued Herein as Fresno County Office of Education, Defendant–Appellant.

No. 16–15372

United States Court of Appeals, Ninth Circuit.

AUGUST 29, 2017

D.C. No. 1:14–cv–00423–MJS Eastern District of California, Fresno

ORDER

THOMAS, Chief Judge:

Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Federal Rule of Appellate Procedure 35(a) and Circuit Rule 35–3. The three-judge panel disposition in this case shall not be cited as precedent by or to any court of the Ninth Circuit.

APPENDIX E

29 U.S.C.A. § 206

§ 206. Minimum wage

Effective: June 30, 2016

Currentness

* * *

(d) Prohibition of sex discrimination

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to

any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

* * *

No. 18-272

IN THE

Supreme Court of the United States

FRESNO COUNTY SUPERINTENDENT OF SCHOOLS,

Petitioner,

v.

AILEEN RIZO,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION

Daniel M. Siegel
Counsel of Record
SIEGEL, YEE & BRUNNER
475 14th Street, Suite 500
Oakland, CA 94612
(510) 839-1200
DanSiegel@siegelyee.com

QUESTION PRESENTED

Once a plaintiff has shown that she is paid less than her male counterparts who do the same work, is it an affirmative defense under the Equal Pay Act, 29 U.S.C. § 206(d), that her employer set the pay for her current job solely on the basis of her prior salary?

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF AUTHORITIES iii
INTRODUCTION 1
STATEMENT OF THE CASE 1
REASONS FOR DENYING THE WRIT 11
I. The question whether reliance on an employee's prior salary, standing alone, can serve as an affirmative defense under the Equal Pay Act does not warrant this Court's review 11
A. The circuits agree that an employer cannot pay a woman less than her male counterparts solely on the basis of what she earned in her prior job 11
B. In the face of changes to state law, the legality of policies like SOP 1440 under the Equal Pay Act has only minimal practical importance 20
C. The Court of Appeals' decision was correct .. 23
II. This case does not raise petitioner's second question presented 29
A. Nothing about the composition of the en banc panel warrants this Court's review 29
B. A judge's participation in a case ends when he has voted and finalized his opinion 32
CONCLUSION 33

TABLE OF AUTHORITIES

Cases

Aldrich v. Randolph Cent. Sch. Dist.,
963 F.2d 520 (2d Cir. 1992) 13, 14

Ali v. Fed. Bureau of Prisons,
552 U.S. 214 (2008) 25

Angove v. Williams-Sonoma, Inc.,
70 Fed. Appx. 500 (10th Cir. 2003) 15

Arnold v. Ben Kanowsky, Inc.,
361 U.S. 388 (1960) 25

Bailey v. Cartwright Sch. Dist.,
No. 2:11-cv-01432 (D. Ariz. July 19, 2011) 18

Beck-Wilson v. Principi,
441 F.3d 353 (6th Cir. 2006) 14

Bradley v. Henry,
518 F.3d 657 (9th Cir. 2008) 31

Clackamas Gastroenterology Assocs., P.C. v. Wells,
538 U.S. 440 (2003) 8

Comm'r v. Clark,
489 U.S. 726 (1989) 25

Comm'r v. Estate of Bedford,
325 U.S. 283 (1945) 32

Corning Glass Works v. Brennan,
417 U.S. 188 (1974) ..... *passim*

Covington v. S. Ill. Univ.,
816 F.2d 317 (7th Cir. 1987) 18, 19, 20

Drum v. Leeson Elec. Corp.,
565 F.3d 1071 (8th Cir. 2009) 17

Duncan v. Tex. Health & Human Servs. Comm'n,
No. AU-17-CA-00023-SS, 2018 WL 1833001 (W.D. Tex. Apr. 17, 2018) 16

EEOC v. Grinnell Corp.,
881 F. Supp. 406 (S.D. Ind. 1995) 19

Ewald v. Royal Norwegian Embassy,
82 F. Supp. 3d 871 (D. Minn. 2014) 17

Exxon Mobil Corp. v. Allapattah Servs., Inc.,
545 U.S. 546 (2005) 9

Fallon v. State of Illinois,
882 F.2d 1206 (7th Cir. 1989) 19

Forstner Chain Corp. v. Marvel Jewelry Mfg. Co.,
177 F.2d 572 (1st Cir. 1949) 32

Glenn v. Gen. Motors Corp.,
841 F.2d 1567 (11th Cir. 1988) 15

Irby v. Bittick,
44 F.3d 949 (11th Cir. 1995) 15

J.W. Frellsen & Co. v. Crandell,
217 U.S. 71 (1910) 30, 31

Jennings v. Stephens,
135 S. Ct. 793 (2015) 30

Jones & Laughlin Steel Corp. v. Pfeifer,
462 U.S. 523 (1983) 26

Lane v. Peña,
518 U.S. 187 (1996) 25

Lauderdale v. Ill. Dep't of Human Servs.,
876 F.3d 904 (7th Cir. 2017) 19

Ledbetter v. Goodyear Tire & Rubber Co.,
550 U.S. 618 (2007) 2, 20, 28

Magnum Imp. Co. v. Coty,
262 U.S. 159 (1923) 31

Marbury v. Madison,
1 Cranch (5 U.S.) 137 (1803) 32

Marks v. United States,
430 U.S. 188 (1977) 31

Marx v. Gen. Revenue Corp.,
568 U.S. 371 (2013) 26

New Process Steel, L.P. v. N.L.R.B.,
560 U.S. 674 (2010) 29

Nguyen v. United States,
539 U.S. 69 (2003) 29

Price v. Lockheed Space Operations Co.,
856 F.2d 1503 (11th Cir. 1988) 15

Rice v. Sioux Mem'l Park Cemetery,
349 U.S. 70 (1955) 22

Riser v. QEP Energy,
776 F.3d 1191 (10th Cir. 2015) 14

Roberts v. Sea-Land Servs., Inc.,
566 U.S. 93 (2012) 24, 25

Sandifer v. U.S. Steel Corp.,
571 U.S. 220 (2014) 25

Schultz v. Dep't of Workforce Dev.,
752 F. Supp. 2d 1015 (W.D. Wisc. 2010)..... 18, 20

Skidmore v. Swift & Co.,
323 U.S. 134 (1944) 8

Stice v. City of Tulsa,
No. 17-CV-0261-CVE-FHM, 2018 WL
3318894 (N.D. Okla. July 5, 2018)..... 16

Sturgeon v. Frost,
136 S. Ct. 1061 (2016) 24

Taylor v. White,
321 F.3d 710 (8th Cir. 2003) 16, 17

The Monrosa v. Carbon Black Export, Inc.,
359 U.S. 180 (1959) 12

United States v. F. & M. Schaefer Brewing Co.,
356 U.S. 227 (1958) 32

United States v. Hark,
320 U.S. 531 (1944) 33

United States v. Hunt,
513 F.2d 129 (10th Cir. 1975) 32

United States v. Jicarilla Apache Nation,
564 U.S. 162 (2011) 26

W. Pac. R.R. Corp. v. W. Pac. R.R. Co.,
345 U.S. 247 (1953) 30

Wash. State Dept. of Soc. & Health Servs. v. Guardianship Estate of Keffeler,
537 U.S. 371 (2003) 24

Wernsing v. Ill. Dep't of Human Servs.,
427 F.3d 466 (7th Cir. 2005) 20

Yates v. United States,
135 S. Ct. 1074 (2015) 24

Statutes

28 U.S.C. § 46(d) 29

29 U.S.C. § 206(d) 7, 11

29 U.S.C. § 206(d)(1) 1, 2, 3, 12

29 U.S.C. § 206(d)(1)(i) 9

29 U.S.C. § 206(d)(1)(ii) 9

29 U.S.C. § 206(d)(1)(iii) 9

29 U.S.C. § 206(d)(1)(iv) ..... *passim*

Equal Pay Act, Pub. L. No. 88-33, 77 Stat. 56 (1963) ..... *passim*

Fair Labor Standards Act of 1938, 29 U.S.C. § 203 et seq. 25

Federal Tort Claims Act, 28 U.S.C. § 2680(h) 25

Cal. Labor Code § 432.3(a) 20, 21

Cal. Labor Code § 432.3(i) 21

Rules and Regulations

9th Cir. R. 35-3 ..... 7, 29

Fed. R. App. P. 36 33

Legislative Materials

109 Cong. Rec. H9199 (daily ed. May 23, 1963) (statement of Rep. Green) 27

109 Cong. Rec. H9213 (daily ed. May 23, 1963) (statement of Rep. Matsunaga) 2

109 Cong. Rec. S8916-17 (daily ed. May 17, 1963) (statement of Sen. Hart) 2

An Act Relating to Equal Pay, S.B. 2351, 29th Leg. Reg. Sess. (Haw. 2018) 21

H.R. Rep. No. 309, 88th Cong., 1st Sess. (1963) . 10, 17

S. Rep. No. 176, 88th Cong., 1st Sess. (1963) 1, 2

A.B. 1676, 2015 Reg. Sess. (Cal. 2016) 21

Other Authorities

Equal Employment Opportunity Commission, Compliance Manual 8

Fresno County Office of Education, *Consultant – Mathematics* (May 31, 2012) 3

Mays, Mackenzie, *Fresno Woman Wins Major Court Decision in Her Quest for Equal Pay for Equal Work*, Fresno Bee (Apr. 10, 2018) 4

Oxford English Dictionary (3d ed. 2004)..... 24

Recent Legislation, *Oregon Equal Pay Act of 2017*, 131 Harv. L. Rev. 1513 (2018)..... 21

Scalia, Antonin & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) 9, 26

Shapiro, Stephen M., et al., *Supreme Court Practice* (10th ed. 2014)..... 12

U.S. Census Bureau, American FactFinder Custom Tables (2016)..... 22

U.S. Census Bureau, Statistics of U.S. Businesses: Historical Data (2015)..... 22

INTRODUCTION

The Equal Pay Act requires that employers pay women and men the same salary for "equal work on jobs the performance of which requires equal skill, effort, and responsibility." 29 U.S.C. § 206(d)(1). Petitioner concedes that it paid respondent Aileen Rizo over $10,000 less per year than it paid male math consultants who performed exactly the same job. Its sole defense is that it set her lower salary based on the wages she earned, for a different job, before it hired her.

Contrary to petitioner's argument, there is not a single circuit in the Nation that would accept this bare-bones justification as an affirmative defense to an Equal Pay Act claim. And going forward, it is unclear why even petitioner cares about the legality of setting an employee's pay based entirely on her salary at a prior job. Intervening developments in state law prohibit California employers like petitioner from using this practice in the future, regardless of how this Court answers petitioner's first question presented.

Petitioner's second question presented would not warrant this Court's time under any circumstances.

STATEMENT OF THE CASE

1. In the years following World War II, the Nation faced a "serious and endemic" problem: a "wage structure" in which men were "paid more" than women although their "duties [were] the same." *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974) (quoting S. Rep. No. 176, 88th Cong., 1st Sess. 1 (1963)). Both as a "matter of simple justice" and as a matter of economics, the results of this disparity were

unacceptable. 109 Cong. Rec. H9213 (daily ed. May 23, 1963) (statement of Rep. Matsunaga). Women were not taking the jobs where they were "most needed" even though many of them had "advanced education and training." *Id.* Further, women's depressed wages harmed their ability to "earn a living" and "support [their] families." 109 Cong. Rec. S8916-17 (daily ed. May 17, 1963) (statement of Sen. Hart).

To "correct" this problem, Congress passed the Equal Pay Act. Equal Pay Act, § 2(b), Pub. L. No. 88-33, 77 Stat. 56 (1963). The objective of the Act is "simple in principle: to require that 'equal work will be rewarded by equal wages.'" *Corning Glass*, 417 U.S. at 195 (quoting S. Rep. No. 176, 88th Cong., 1st Sess. 1 (1963)).

Under the Act, a plaintiff can recover damages if she shows that she was paid less than a colleague of the opposite sex who performed "equal work." 29 U.S.C. § 206(d)(1), (3). To constitute "equal work," a job must "require[] equal skill, effort, and responsibility." *Id.* § 206(d)(1). Petitioner does not contest that Aileen Rizo and her male counterparts were engaged in equal work. *See* Pet. 5.

"[T]he EPA does not require" plaintiffs to provide "proof of intentional discrimination." *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 640 (2007). Instead, an employer becomes presumptively liable once the plaintiff has established the existence of a pay gap in which he or she is paid less than workers of the opposite sex. *Corning Glass*, 417 U.S. at 195. Petitioner no longer contests the existence of such a gap here. *See* Pet. 6; *see also* Pet. App. 78a.

The Act also creates an affirmative defense for employers who can prove that an otherwise illegal pay

gap is due to "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." 29 U.S.C. § 206(d)(1). Only the fourth affirmative defense is at issue in this case.

2. Petitioner is Jim Yovino, Fresno County Superintendent of Schools, sued in his official capacity. The Fresno County Office of Education, led by the Fresno County Superintendent of Schools, provides services and technical assistance to thirty-two school districts and charter schools within the County. The Ninth Circuit accordingly referred to petitioner as "the County." Pet. App. 3a.

The County employs a number of "math consultants." These employees train high school math teachers on curricular standards. Fresno County Office of Education, *Consultant – Mathematics* (May 31, 2012), https://perma.cc/9XQL-WCNA. The County classifies them as managerial employees because, unlike classroom teachers, they coordinate curricular standards across multiple school districts in Fresno County. *See id.*

When the County posts an opening for a managerial job like math consultant, it includes the responsibilities, required qualifications, and salary range. Pet. App. 67a. It does not, however, explain how a new employee's actual salary will be set. *See id.*

From 2004 to 2015, when an applicant accepted the County's offer, the County set the individual's salary using an internal policy known as Standard Operation Procedure #1440 (SOP 1440). Pet. App. 66a. SOP 1440 eliminated the County's previous practice of considering prospective hires' experience and

qualifications in setting salaries. *Id.* The County has since abandoned SOP 1440.[1]

Under SOP 1440, the County instead calculated new employees' wages by taking their most recent salaries, adding five percent, and then placing them on the nearest step in a ten-step salary scheme. Pet. App. 66a. The only adjustment to that salary was a $600 stipend for a master's degree or a $1,200 stipend for a doctorate. RE 448.[2] Under SOP 1440, the average female employee hired into a management position was placed more than two steps below the average male employee.[3]

Aileen Rizo is a career educator. Pl. Br. in Opp'n to Summ. J. at 7. She holds a bachelor's degree in math education and master's degrees in both math education and educational technology. Pet. App. 4a. Prior to becoming a math consultant with Fresno County, she was a classroom teacher in Maricopa County, Arizona. *Id.* As part of her thirteen years'

---

[1] Counsel for petitioner explained that SOP 1440 "was in effect through December 31, 2015." Mackenzie Mays, ***Fresno Woman Wins Major Court Decision in Her Quest for Equal Pay for Equal Work***, Fresno Bee (Apr. 10, 2018) (quoting Michael Woods), https://perma.cc/ADH4-MAAW; *see also infra* pages 20-21 (explaining the current legal status of prior salary-only pay formulas under California law).

[2] "RE" refers to petitioner's Excerpts of Record in the court of appeals (Doc. No. BL-12).

[3] The County's own data show that the average female management employee was placed at step 6.3 on the salary scale while the average male employee was placed at step 8.8. *See* Pl. Br. in Opp'n to Summ. J. at 10. In 2009, the year respondent was hired, this gap corresponded to at least a $5,000 salary difference on the County's salary scale. *See* RE 544-54; Pl. Br. in Opp'n to Summ. J. at 10; *see also* Rizo Decl. ¶ 11.

experience in education, she had gained extensive expertise in curricular development and served as a department head. Pl. Br. in Opp'n to Summ. J. at 7.

In 2009, Ms. Rizo moved her young family to Fresno in search of the opportunity to "grow as a professional." Tr. Rizo Dep. 13. She successfully applied for the position of math consultant. The starting salary range for that position went from $62,133 for employees placed on Step 1 to $81,461 for employees placed on Step 10. RE 448. Relying solely on Ms. Rizo's salary as a classroom teacher in Maricopa County, petitioner placed her on Step 1 of its pay scale for math consultants – the lowest step – and informed her of the salary she would be paid. Pet. App. 70a-71a.

3. In 2012, Ms. Rizo discovered over lunch that her three male colleagues – who performed the same work that she did – had been initially placed on Steps 7, 7, and 9 of the County's ten-step scale. Pet. App. 71a, 77a. This had entitled each of them to starting salaries over $10,000 higher than Ms. Rizo's. *See* RE 448.

Ms. Rizo filed a formal internal challenge to the pay disparity. Pet. App. 5a. In response, the County compiled a report analyzing the demographics and pay of employees who held similar positions and used it to assert that SOP 1440 did not produce a gender disparity. Pet. App. 72a.[4]

---

[4] The County's data showed that women were twice as likely as men to be placed on the lower half of the salary scale. Pl. Br. in Opp'n to Summ. J. at 10. The County's conclusion that SOP 1440 did not produce a pay disparity rests on a mistake. The County thought there was no problem because the policy had

Having failed to receive a remedy from the County, Ms. Rizo filed suit in state court against the Fresno County Superintendent of Schools, Jim Yovino, in his official capacity. Pet. App. 5a. She sought damages for violations of the Equal Pay Act, Title VII, and California anti-discrimination statutes. *See id* at 5a-6a. Petitioner removed the case to federal court. *Id.* at 64a.

After some discovery, the County moved for summary judgment. Pet. App. 6a. By this phase of the litigation, it had conceded that it paid Ms. Rizo "less than her male counterparts for the same work." *Id.* However, the County argued that it was entitled to do so because its exclusive reliance on her prior salary to set pay for her current job produced a permissible wage gap based on "any other factor other than sex" under Section 206(d)(1)(iv). *See id.*

The district court thought petitioner was wrong. It reasoned that "a pay structure based exclusively on prior wages," such as SOP 1440, "is so inherently fraught with the risk – indeed, here, the virtual certainty – that it will perpetuate a discriminatory wage disparity between men and women that it cannot stand." Pet. App. 84a. In light of the "across-the-board pay disparity between male and female educators," the

---

"placed more females in the same or similar position in the same department higher on the salary schedule than males." Pet. App. 72.

This assertion confuses absolute numbers with the relevant measure, which is the relative step distribution within each gender. The absolute number of women receiving high-step salaries was higher than the absolute number of men receiving those salaries, because there were vastly more female employees. *See* RE 544-54.

district court explained that salary systems based exclusively upon prior pay "will perpetrate that disparity" and subvert the remedial objectives of the Equal Pay Act. *Id.* at 85a.

But the district court was uncertain as to the precedent within the Ninth Circuit regarding bare reliance on prior pay under the Equal Pay Act. Pet. App. 92a. It therefore certified a narrow question for interlocutory appeal: "[W]hether, as a matter of law under the EPA, 29 U.S.C. § 206(d), an employer subject to the EPA may rely on prior salary alone when setting an employee's starting salary." *Id.* at 92a-93a.

4. A panel of the Ninth Circuit stated that under circuit precedent, past pay could constitute an affirmative defense for an otherwise illegal pay disparity under certain circumstances. An employer could "base a pay differential on prior salary so long as it showed" that it had "used the factor reasonably in light of its stated purpose and its other practices," and that it "effectuate[d] some business policy." Pet. App. 60a. The panel therefore directed the district court to consider petitioner's rationales for its exclusive reliance on Ms. Rizo's prior salary, and determine whether they justify the evident pay disparity. *See id.* at 61a.

5. The Ninth Circuit granted rehearing en banc before a panel of eleven judges. Pet. Ap p. 1a-2a; 9th Cir. R. 35-3.

The EEOC appeared as an amicus curiae in support of Ms. Rizo. Pet. App. 33a. It directed the court's attention to the interpretive guidance contained in its Compliance Manual, which "constitute[s] a 'body of experience and informed judgment' to which [courts] may resort for guidance,"

Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 449 n.9 (2003) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). *See* EEOC C.A. Br. 13. Since 2000, the Compliance Manual has provided that "[p]rior salary cannot, by itself, justify a compensation disparity." EEOC Compliance Manual § 10-IV(F)(2)(g). In its brief to the Ninth Circuit, the EEOC argued that "because exclusive reliance on prior salary institutionalizes the disparity between what men and women earn on average, the practice undermines the purpose of the EPA." EEOC C.A. Br. 10-11.

All eleven judges agreed with respondent and the EEOC that petitioner's bare reliance on Ms. Rizo's former pay to set her salary did not constitute an affirmative defense within the meaning of Section 206(d)(1)(iv). Pet. App. 4a. The six-judge majority explained that Section 206(d)(1)(iv) can excuse a pay differential only when that differential is based on "legitimate" factors. Pet App. 13a. Such factors "must be job related," *id.*; that is, they must be "measure[s] of work experience, ability, performance, or any other job-related quality," *id.* at 25a.

According to the panel majority, prior salary, standing alone, is not a "legitimate" factor. Pet. App. 25a. Any relationship it has to job-related factors for a current job is "attenuated." *Id.* Thus, the majority directed that "[r]ather than use a second-rate surrogate that likely masks continuing inequities," the employer must "point directly to the underlying factors for which prior salary is a rough proxy" in order to "prove its wage differential is justified." *Id.* at 25a-26a.

The majority identified two principal bases for its conclusion. First, the majority focused on the text of

the Equal Pay Act, the "authoritative statement" of the law's meaning. Pet. App. 15a (quoting *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005)). It began its analysis by drawing on the canons of *noscitur a sociis* and *ejusdem generis*, which require interpreting the text of the fourth affirmative defense in light of the three specific affirmative defenses listed immediately before it. *Id.* at 13a. Thus, Section 206(d)(1)(iv) is limited to those factors that are "similar" to merit, seniority, and production – and accordingly reflect "legitimate, job-related reasons." *Id.* at 13a-14a; *see also id.* at 13a (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 199 (2012)).

Second, the majority found "further support[]" for its conclusion in both the "primary purpose" of the Equal Pay Act, Pet. App. 15a, and "the history of the legislative process" that produced it, *id.* at 10a. The purpose of the Act was to "eliminate long-existing 'endemic' sex-based wage disparities." *Id.* The court of appeals therefore found it "inconceivable" that Congress "would create an exception for basing new hires' salaries on those very disparities." *Id.*

In addition, Sections 206(d)(1)(i)-(iv) were added after employers voiced concern that the Act could disrupt their ability to use "bona fide job evaluation plans," in order to assess "the value of a particular job." Pet. App. 16a (citing *Corning Glass*, 417 U.S. at 200). The fourth affirmative defense responds directly to these concerns: Explaining what the defense would cover, the House Report listed "shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, [and] differences based on experience, training, or

ability." *Id.* at 19a (quoting H.R. Rep. No. 88-309, at 3 (1963)). In light of the legislative record, the en banc panel found it "plain that the catchall exception" encompassed only "legitimate, job-related means of setting pay." *Id.* at 18a.

The opinion disclaimed any attempt to resolve the application of its general rule "under all circumstances." Pet. App. 12a. In particular, the majority expressly reserved the question "whether[,] or under what circumstances, past salary may play a role in the course of an individualized salary negotiation." *Id.*

Judge McKeown (joined by Judge Murguia) concurred. She described "Rizo's case [as] an easy one" – a "textbook violation" of the Equal Pay Act. Pet. App. 30a. Like the majority, Judge McKeown concluded that "prior salary alone is not a defense to unequal pay for equal work." *Id.* at 29a. In another case, prior salary might "provide a lawful benchmark for starting salary" if used "along with valid job-related factors." *Id.* at 32a. Here, however, "the majority correctly decide[d] the only issue squarely before the court." *Id.* at 29a.

Judge Callahan (joined by Judge Tallman) also agreed that "a pay system that relie[s] exclusively on prior salary is conclusively presumed to be gender based." Pet. App. 45a. Given "the history of pay discrimination and the broad purpose of the Equal Pay Act, prior pay by itself is not inherently a 'factor other than sex.'" *Id.* at 43a. Because, in this case, "the County based pay only on prior salary," the district court "properly denied it summary judgment." *Id.* at 48a. But like Judges McKeown and Murguia, Judges Callahan and Tallman thought there might be

occasions, particularly in the private sector, where "a pay system that uses prior pay as one of several factors deserves to be considered on its own merits." *Id.* at 45a; *see id.* at 38a.

Judge Watford filed a brief concurrence in the judgment. He pointed out that "even after controlling for education, work experience, and other factors," persistent gender pay disparities remain today "in virtually every sector of the American economy." Pet. App. 51a. These disparities are precisely what the Equal Pay Act was intended to combat. Because a woman's past pay is "highly likely" to "reflect, at least in part" this discrimination, *id.* at 51a, an employer can rely on past pay only if it can show that that past pay does not "perpetuate" precisely what the Act "was intended to outlaw," *id.* at 49a. In this case, petitioner had "failed" to make this showing. *Id.* at 51a.

REASONS FOR DENYING THE WRIT

I. The question whether reliance on an employee's prior salary, standing alone, can serve as an affirmative defense under the Equal Pay Act does not warrant this Court's review.

Petitioner asks this Court to "decide whether employers may consider prior salary." Pet. 10. But here the Ninth Circuit answered a narrower certified question: "[W]hether, as a matter of law under the [Equal Pay Act], 29 U.S.C. § 206(d), an employer subject to the EPA may rely on prior salary alone when setting an employee's starting salary." Pet. App. 6a n.4.

The circuits that have addressed this question all agree that the answer is "No." The text and logic of Section 206(d) and this Court's decision in *Corning*

Glass Works v. Brennan, 417 U.S. 188 (1974), show why that answer is correct.

Moreover, contrary to the arguments of petitioner and its amici, this is not the right case for answering other, more sweeping questions about the ways in which employers set starting salaries. Most strikingly, in light of recent state legislation, the decision below does not even shape the future legal obligations of most employers in the Ninth Circuit.

A. The circuits agree that an employer cannot pay a woman less than her male counterparts solely on the basis of what she earned in her prior job.

The County claims that "[t]he circuits diverge on whether prior pay is a 'factor other than sex'" sufficient to establish an affirmative defense under Section 206(d)(1) of the Equal Pay Act. Pet. 10. The County is wrong. It confuses variations in the language the courts of appeals have used to explain their decisions with variations in outcome. All circuits agree that sole reliance on prior pay to set starting salaries does not qualify as an affirmative defense under Section 206(d)(1)(iv) when this policy results in women being paid less than men who do the same work. Thus, there is no "genuine conflict" here: On these facts, every court would reach the same conclusion. Stephen M. Shapiro et al., *Supreme Court Practice* 242 (10th ed. 2014).

As for any potential disagreement with respect to other uses of prior pay in setting salaries, this Court should "await a day when the issue is posed less abstractly." *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) (dismissing certiorari as improvidently granted).

1. Petitioner concedes that a policy of setting starting salaries based entirely on a worker's prior pay at another job would not qualify as an affirmative defense under Section 206(d)(1)(iv) in the Second, Sixth, Tenth, or Eleventh Circuits. Pet. 15-16.

The Second Circuit took this position in *Aldrich v. Randolph Central School District*, 963 F.2d 520 (2d Cir. 1992). There, a school "cleaner" brought suit on the basis that her all-female cohort made less than the district's all-male cohort of "custodians" despite the fact that both groups did the same work. *Id.* at 522-23. The district court granted the defendant's motion for summary judgment, holding that the pay differential was permissible under the Equal Pay Act because it was solely the product of a formally neutral civil service exam. *Id.* at 524.

On appeal, the Second Circuit held that the district was not entitled to summary judgment because "employers cannot meet their burden" under Section 206(d)(1)(iv) by pointing to "a gender-neutral classification system *without more.*" *Aldrich*, 963 F.2d at 525 (emphasis added). Unless the school district could prove that the higher pay for custodians was "related to performance of the custodian's job" – that is, to the job for which the pay was being set – it would violate the Equal Pay Act to pay women less. *Id.* at 527. Reliance on the examination results alone did not "provide a valid factor-other-than-sex defense." *Id.* Likewise, an employer cannot rely on prior pay, a facially neutral factor, unless it shows that prior pay is "related to [the] performance" of an employee's current job. *Id.*

Petitioner admits that "[t]he Sixth Circuit applies the same rule" as the Second Circuit. Pet. 11. As that

court explained in *Beck-Wilson v. Principi*, 441 F.3d 353 (6th Cir. 2006), the "'factor other than sex' defense" operates as "a sort of hybrid between the seniority and merit defenses." *Id.* at 365-66. Thus, past salary can justify a pay differential only if it is "rooted in legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue." *Id.* at 366 (quoting *Aldrich*, 963 F.2d at 525).

So too in the Tenth Circuit. The County cites *Riser v. QEP Energy*, 776 F.3d 1191 (10th Cir. 2015), as its example of the Tenth Circuit having "staked out yet another" position that "conflicts with both the Ninth Circuit and the Second and Sixth Circuits." Pet. 11. But had petitioner read the sentence immediately preceding those it plucks from *Riser*, it would have discovered that the Tenth Circuit allows reliance on a facially neutral policy only where any resulting difference in pay is rooted in "legitimate business-related differences in work responsibilities and qualifications *for the particular positions at issue*." *Id.* at 1199 (emphasis added). The source for this proposition? The Second Circuit's decision in *Aldrich*. *See id.* (citing *Aldrich*, 963 F.2d at 525).

In *Riser*, the defendant claimed it was entitled to pay a female employee 31% and 39% less than her two male counterparts, respectively, because of her past pay and "compensation data in the industry." *Riser*, 776 F.3d at 1198-99. The Tenth Circuit rejected that claim. *Id.* at 1199. Mirroring the decision in respondent's case, the Tenth Circuit concluded that "the EPA 'precludes an employer from relying solely upon a prior salary to justify [a] pay disparity.'" *Id.*

(quoting *Angove v. Williams-Sonoma, Inc.*, 70 Fed. Appx. 500, 508 (10th Cir. 2003)).

Finally, the Eleventh Circuit also agrees that an employer cannot establish an affirmative defense in an Equal Pay Act case "by resting on prior pay alone." *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995). Defendants face a heavy evidentiary burden to show that legitimate "business reasons reasonably explain the utilization of prior salary." *Id.* at 955-56 (internal alterations omitted) (quoting *Price v. Lockheed Space Operations Co.*, 856 F.2d 1503, 1506 (11th Cir. 1988)). Because the Eleventh Circuit has "consistently held that 'prior salary alone cannot justify [a] pay disparity' under the EPA," sole reliance on salary history does not absolve a defendant of liability. *Id.* at 955 (quoting *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1571 & n.9 (11th Cir. 1988)).

2. The Ninth Circuit's decision is entirely consistent with the decisions of the Second, Sixth, Tenth and Eleventh Circuits on the question presented here: Whether past pay alone can justify an otherwise illegal wage gap. As described above, the Ninth Circuit requires that an employer justify a differential in pay by "point[ing] directly to the underlying factors" connected to the individual's suitability for a particular job that "prove its wage differential is justified." Pet. App. 25a-26a; *see supra* pages 8-10. Employers cannot instead use past pay as "a second-rate surrogate" for the appropriate analysis. Pet. App. 25a. Here, because the County offered no evidence that Ms. Rizo's prior pay as a classroom teacher indicated anything about her qualifications for the job of math consultant, the Ninth Circuit held that the County was not entitled to summary judgment on

its affirmative defense; it could not rely on her past pay to justify its presumptively unlawful pay gap.[5]

Unlike petitioner, federal judges think the Ninth Circuit's position tracks the established consensus. A Texas district court referenced the decision here to show that "several circuits" hold that a past pay disparity cannot be the "sole justification" for wage inequality. *Duncan v. Tex. Health & Human Servs. Comm'n*, No. AU-17-CA-00023-SS, 2018 WL 1833001, at *4 n.3 (W.D. Tex. Apr. 17, 2018). Similarly, an Oklahoma district court cited the en banc opinion alongside in-circuit precedent for the proposition that prior pay, without more, cannot justify a pay disparity under Section 206(d)(1)(iv). *See Stice v. City of Tulsa*, No. 17-CV-0261-CVE-FHM, 2018 WL 3318894, at *4 (N.D. Okla. July 5, 2018).

3. Because petitioner admits that it could not have obtained summary judgment in any of the circuits already discussed, its claim of a circuit split turns entirely on how this case would be decided in the Seventh and Eighth Circuits. *See* Pet. 15-16. But these circuits would have reached the same conclusion as the others.

First, petitioner misstates the law in the Eighth Circuit. It relies exclusively on *Taylor v. White*, 321 F.3d 710 (8th Cir. 2003). That case is inapposite, for reasons Congress explained in the Equal Pay Act's legislative history. *Taylor* involved a distinctive and permissible employment practice known as a "salary

---

[5] Petitioner observes that "[i]n the Ninth Circuit, Rizo is entitled to summary judgment as to liability." Pet. 15. Whether Ms. Rizo, who has not yet moved for summary judgment, is entitled to it is a matter to be determined on remand.

retention policy." *Id.* at 716-17. Such policies enable employers to temporarily "transfer employees to other less demanding jobs" but "continue to pay them a premium rate in order to have them available when they are again needed" to resume their former responsibilities. *See* House Comm. on Education & Labor, H.R. Rep. No. 309, 88th Cong., 1st Sess., at 3 (1963). The wage gap at issue in *Taylor* was not attributable to the plaintiff's salary history; rather, it was a product of the fact that she and her male comparator usually performed different work. 321 F.3d at 716-17.

But when the Eighth Circuit considered a case more similar to Ms. Rizo's, it reached the same result as the Ninth Circuit. In *Drum v. Leeson Electrical Corp.*, 565 F.3d 1071 (8th Cir. 2009), a case ignored by petitioner, the defendant employer "attempt[ed] to justify" a plaintiff's salary "by highlighting her prior salaries." *Id.* at 1073. The Eighth Circuit rejected the employer's argument. It held that prior salary, without evidence of male employees' better "education, experience, or other qualifications," "fails to prove as a matter of law" that the discriminatory wage practices were "due to a factor other than sex." *Id.* District courts within the circuit follow that rule. *See Ewald v. Royal Norwegian Embassy*, 82 F. Supp. 3d 871, 948 (D. Minn. 2014) ("[R]eference to the lower-paid employee's education, experience, or other qualifications is necessary to determine whether the reliance on prior salary for the higher-paid comparator is based on a factor other than sex.").

Petitioner would also lose in the Seventh Circuit. Here, too, petitioner overlooks the Circuit's foundational case construing Section 206(d)(1)(iv).

The Circuit's analysis in *Covington v. Southern Illinois University*, 816 F.2d 317 (7th Cir. 1987), provides two reasons why petitioner's policy would not constitute an affirmative defense under the Equal Pay Act in the Seventh Circuit.

First, the Seventh Circuit highlighted the risk of unjustifiable wage disparities when an employer looks to a worker's pay history with a "previous employer." *Covington*, 816 F.2d at 322-23. It distinguished this form of reliance on prior pay from one in which an employer looks to the salaries it paid its *own* workers. *Id.* at 322; *see also Schultz v. Dep't of Workforce Dev.*, 752 F. Supp. 2d 1015, 1030-31 (W.D. Wisc. 2010). This is because reliance on a prior employer's practices can unknowingly "perpetuate" the very wage disparities that the Equal Pay Act targets. *Covington*, 816 F.2d at 322. After all, "there are enormous difficulties involved in determining whether another business discriminated on the basis of sex." *Id.* at 323; *accord* Pet. App. 49a.

Ms. Rizo's case involves reliance on the salary she earned with a prior employer – precisely the kind of policy *Covington* warned about. And there is good reason to be concerned with that sort of reliance. Ms. Rizo's prior employer, Cartwright School District, was the defendant in at least one lawsuit alleging employment discrimination on the basis of sex. *See* Complaint at 2, 4-5, *Bailey v. Cartwright Sch. Dist.*, No. 2:11-cv-01432 (D. Ariz. July 19, 2011). While it is unclear whether Ms. Rizo's own pay at Cartwright was affected by sex discrimination, Fresno County was in no position to investigate or respond to that possibility. The risks of using external prior pay that *Covington*

presents would be at their highest in a situation like Ms. Rizo's.

Second, in *Covington*, the Seventh Circuit emphasized that there was "no evidence" that the employer's use of prior pay was "either discriminatorily applied or has a discriminatory effect." 816 F.2d at 322; *see also Fallon v. State of Illinois*, 882 F.2d 1206, 1211 (7th Cir. 1989); *EEOC v. Grinnell Corp.*, 881 F. Supp. 406, 412 (S.D. Ind. 1995) (denying summary judgment where a facially neutral prior-pay policy disproportionately "rewarded male employees").

By contrast, Ms. Rizo's case involves a policy that, while neutral on its face, systematically disadvantaged women. The County's own data show that, under SOP 1440, the average woman was placed more than two steps below the average man – corresponding to a pay disparity of over $5,000. *See supra* page 5 n.4. On these facts, the County could not satisfy *Covington*'s standard.[6]

The two Seventh Circuit cases petitioner cites, Pet. 12-13, hardly establish a conflict. *Lauderdale v. Ill. Dep't of Human Servs.*, 876 F.3d 904 (7th Cir. 2017), does not concern sole reliance on prior pay; rather, the defendant cited three separate bases for the challenged wage gap. *Id.* at 908. As for *Wernsing v.*

---

[6] There was also evidence before the district court that the County "has deviated from the standards set forth in SOP 1440." Pet. App. 69a. For example, Mark Hamonds, like Ms. Rizo, "should have been placed at Step 1" under SOP 1440, but petitioner approved placing him at Step 2 instead. *Id.* 70a. His resulting starting salary was over $1,500 more per year than SOP 1440 would have dictated. *See* RE 448.

Illinois Department of Human Services, 427 F.3d 466 (7th Cir. 2005), that case concerned a transfer between departments within a state government, *id.* at 467; *see also Schultz*, 752 F. Supp. 2d at 1030 (distinguishing *Wernsing*'s facts from the plaintiff's on this basis). *Wernsing* did not purport to disturb the distinction that *Covington* drew between internal transfers and external hires. 427 F.3d at 468; *see also Schultz*, 752 F. Supp. 2d at 1030-31. Indeed, Judge Easterbrook relied on *Covington* as a correct statement of the Seventh Circuit rule. *Wernsing*, 427 F.3d at 468. District courts within the circuit have therefore continued to reject bare reliance on prior pay from a different employer as justification for a wage gap. *Schultz*, 752 F. Supp. 2d at 1030.[7]

B. In the face of changes to state law, the legality of policies like SOP 1440 under the Equal Pay Act has only minimal practical importance.

1. Petitioner has already abandoned the very policy it asks this Court to uphold. *See supra* page 4 n.1.

Indeed, it had no choice. In 2016, the California Legislature amended state law to expressly forbid policies like SOP 1440. California Labor Code

---

[7] It would be a mistake to read *Wernsing* too broadly. While there is some loose language in Judge Easterbrook's opinion to the effect that "sex discrimination" is forbidden by the Equal Pay Act only if it is "an intentional wrong," 427 F.3d at 469, restricting the Act to purposeful discrimination would contradict this Court's clear statements in *Corning Glass*, 417 U.S. at 205, and *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 640 (2007).

Section 432.3(a) now provides that an employer "shall not rely" on an applicant's "salary history information" in determining "what salary to offer an applicant." And Section 432.3(i) expressly requires that the California analogue to the Equal Pay Act, Cal. Lab. Code § 1197.5, not be "construed to allow prior salary, by itself, to justify any disparity in compensation" between men and women.

The 2016 legislation was tailor-made to reach policies like SOP 1440. In fact, its preamble cites Ms. Rizo's case by name as an example of the "problematic" practice of "relying on prior salary to set employees' pay rates" that California law now forbids. A.B. 1676 § 1(f), (b), 2015 Reg. Sess. (Cal. 2016). State law now precludes the County from using SOP 1440 or relying on it as a defense in future state Equal Pay Act claims. Thus, petitioner's practical stake in this case is limited entirely to Ms. Rizo's individual claim for retrospective damages.

Nor is the question presented important to most other employers within the Ninth Circuit. Since 2016, Oregon and Hawaii, like California, have prohibited reliance on prior pay in setting an employee's starting salary – making policies like SOP 1440 illegal in those states. *See* Recent Legislation, *Oregon Equal Pay Act of 2017*, 131 Harv. L. Rev. 1513, 1515-16 (2018); An Act Relating to Equal Pay, S.B. 2351, 29th Leg. Reg. Sess. (Haw. 2018). These states house the vast majority of Ninth Circuit businesses and residents. As petitioner and its amici acknowledge, employers subject to conflicting state and federal law "adopt whatever rule is most stringent." Pet. 19. For residents

of covered states, state law effectively controls employment practices based on prior pay.[8]

Nor are states within the Ninth Circuit the only jurisdictions that regulate the use of prior pay to set salaries. Massachusetts, Delaware, Puerto Rico, and several major cities have passed similar laws. *See* Recent Legislation, 131 Harv. L. Rev. at 1515-16. The stringency of state and local law now means that all employers operating in these jurisdictions will forgo practices like SOP 1440 regardless of how this Court answers petitioner's first question presented. That is likely to be increasingly true, since an additional twenty states and the District of Columbia have also been considering such legislation. *See id.* at 1516. For these employers, any review by this Court would do nothing more than "satisfy a scholarly interest," *Rice v. Sioux Mem'l Park Cemetery*, 349 U.S. 70, 74-75 (1955) (dismissing certiorari as improvidently granted because of subsequent state legislation).

2. In their effort to inflate this case's importance, petitioner and its amici ask this Court to determine whether employers may "ask about and rely on prior pay." Pet. 16. But that question is neither posed by this case nor in doubt under federal law: Of course they can.

---

[8] According to the 2015 Statistics of U.S. Businesses, 70% of firms in the Ninth Circuit are located in California, Oregon, and Hawaii. *See* U.S. Census Bureau, *Statistics of U.S. Businesses: Historical Data* (2015), http://www.census.gov/programs-surveys/susb/data/tables.html. Similarly, 68% of residents live in covered states. *See* U.S. Census Bureau, *American FactFinder Custom Tables* (2016).

The "widespread employment practices" that petitioner invokes, Pet. 16, are left untouched by the Equal Pay Act unless and until they result in employees of one sex being paid less than employees of another. Thus, as long as employers do not violate the Act's requirement of equal pay for equal work, they are entirely free to use prior pay to assess a candidate's level of experience or skill. And employers may continue to use prior pay to "evaluate a candidate's pay expectations," to "identify the prevailing local rates" for a given position, or to screen for "candidates whose prior salary makes it unlikely they will accept" a particular role, *id.* at 16-18, as long as those practices do not introduce an illegal wage disparity between men and women.

In short, the Act does not go as far as petitioner and its amici imply – but state law does. These facts, in combination, limit the impact of any ruling by this Court on employers' choices moving forward.

C. The Court of Appeals' decision was correct.

The Ninth Circuit rightly concluded that an employer cannot pay a female employee less than her male counterparts solely because of her prior salary at a different job with a different employer. Such a policy does not qualify as "a differential based on any other factor other than sex" within the meaning of 29 U.S.C. Section 206(d)(1)(iv). The Ninth Circuit's holding follows straightforwardly from the text, history, and logic of the Equal Pay Act.

1. As a matter of statutory language, the Act's fourth affirmative defense protects employers only if the pay differential is "based on any other factor other than sex." 29 U.S.C. § 206(d)(1)(iv). Petitioner ignores

completely the critical phrase "any *other* factor" in its construction of the statute. *Id.* (emphasis added). The Oxford English Dictionary provides a definition of the phrase "any other" that shows that it refers to a thing "specified or understood contextually." *Other*, Oxford English Dictionary (3d ed. 2004). Congress's use of this phrase therefore highlights the importance of where Section 206(d)(1)(iv) is situated – namely, (a) in a list of (b) affirmative defenses.

a. The canons of statutory construction on which the Ninth Circuit relied, *see* Pet. App. 13a, explain how to treat a general term that appears after a list of specific provisions. *Noscitur a sociis* stands for the principle that words are to be understood by the company they keep. *Ejusdem generis* applies this principle to general provisions following specific lists: "Where general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Yates v. United States*, 135 S. Ct. 1074, 1086 (2015) (plurality opinion) (alteration in original) (quoting *Wash. State Dept. of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003)). Thus, in *Yates*, the plurality defined the statutory term "any tangible object" to mean an "object[] used to record or preserve information" because it followed the specifically enumerated terms "record" and "document." *Id.* at 1087.

b. Moreover, Section 206(d)(1)(iv) involves an affirmative defense. Words in a statute must be construed "with a view to their place in the overall statutory scheme." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016) (quoting *Roberts v. Sea-Land Servs., Inc.*,

566 U.S. 93, 101 (2012)). In this statute, the phrase "any other factor" operates to identify an exception under which an employer can justify a pay disparity that would otherwise be illegal. *See Corning Glass*, 417 U.S. at 196-97. When "a general statement of policy is qualified by an exception," this Court "read[s] the exception narrowly in order to preserve the primary operation of the provision." *Comm'r v. Clark*, 489 U.S. 726, 739 (1989). This rule is especially strong in the context of the Fair Labor Standards Act, within which the Equal Pay Act is located. There, exceptions are "narrowly construed against the employers seeking to assert them." *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 232 n.7 (2014) (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)).[9]

In light of the canons of *noscitur a sociis* and *ejusdem generis* and the narrow-construction rule for FLSA exceptions, the Ninth Circuit correctly limited the fourth affirmative defense to "legitimate, job-related factors." Pet. App. 10a. The first three affirmative defenses relate to an employee's current job. Seniority rewards the "heightened value" that employees accrue through "personal work

---

[9] This Court should not rely on constructions of the phrase "any other" that appear outside the Fair Labor Standards Act. For example, in *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 221-23 (2008), this Court interpreted the meaning of "any other" in the phrase "any other law enforcement officer" expansively. But that case involved the Federal Tort Claims Act, 28 U.S.C. § 2680(h). This Court has long held that, because the FTCA waives the government's sovereign immunity, such a waiver "will be strictly construed, in terms of scope, in favor of the sovereign." *Lane v. Peña*, 518 U.S. 187, 195 (1996). Accordingly, "any other" in the law enforcement proviso must be construed expansively in order to restrict the government's waiver.

experiences" over time. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 535 (1983). Merit rewards skills. And quality and quantity of production reward output. In this way, the three specific affirmative defenses enable an employer to pay more to an employee who has more to offer. The fourth affirmative defense should therefore also be limited to job-related factors, and petitioner has never explained why Ms. Rizo's prior pay indicates anything about her ability to perform the job for which petitioner hired her. Nor has petitioner explained why an affirmative defense like Section 206(d)(1)(iv) should be construed broadly to include factors unrelated to job performance.

2. Additionally, petitioner's reading would render the enumerated affirmative defenses surplusage. This Court has warned against interpretations that "render superfluous" another part of the statutory text. *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 176 (2012). In the context of a list containing both specific and general terms, this Court "will not read a 'catchall' provision" to create general terms "that would include those specifically enumerated." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 186 (2011). Petitioner is undeterred by this longstanding rule. Its construction of Section 206(d)(1)(iv) easily includes the three specifically enumerated defenses within the catchall because none of them – merit, seniority, or quantity or quality of production – involves considering sex as such. In petitioner's reading, the specifically enumerated exceptions are unnecessary. But rather than passing a statute with a single

exception, Congress enacted a statute with four. The Ninth Circuit was right to give Congress's choice meaning.

3. Petitioner cannot escape the meaning of the text by selectively resorting to legislative history. Petitioner quotes language from a House Committee Report for the proposition that courts should construe Section 206(d)(1)(iv) broadly. Pet. 26. But it leaves out the Report's very next sentence, which provides specific examples of practices that would fall within that provision. Every example that the Report provides involves a factor related to the employee's current job that would easily satisfy the Ninth Circuit's test. *See supra* page 9 (listing the factors).

Far from serving the purposes of the Equal Pay Act, petitioner's reading would have rendered the Act a dead letter on the day it was passed. In 1963, women's wages averaged less than two thirds of men's. 109 Cong. Rec. H9199 (daily ed. May 23, 1963) (statement of Rep. Green). If prior pay could have justified a wage differential, the Act would have simply enshrined the persistent "wage differentials" it was designed to "correct." Pub. L. 88-38 § 2(a).[10]

4. Contrary to petitioner's argument, prior pay is not a job-related factor. *Cf.* Pet. 24. Petitioner is simply wrong to claim that prior pay is a good stand-in for a worker's "qualification[s], experience, and performance," *id.* – all the more so when, as here, a worker is moving into a different job. For example,

---

[10] The gap persists today. On average, "the median weekly earnings of full-time workers in the '[e]ducation, training, and library occupations'" – Ms. Rizo's field – "are $1,140 for men and $897 for women." Pet. App. 75a n.6.

under petitioner's view, a law firm could pay a male first-year associate, whose pre-law school job was at a consulting firm, $190,000 per year while paying a female first-year associate, who worked her way through law school as a waitress, the minimum wage. This cannot be the law. Under the Equal Pay Act, deviations from equal pay require a tangible relationship to differences in what the plaintiff and opposite sex comparators are doing *now*.

Ms. Rizo's situation offers a powerful rebuttal to the claim that prior salary alone can legitimately explain why a female worker is being paid less than her male colleagues. Ms. Rizo had better qualifications and more experience than her male comparators. *See* Pl. Br. in Opp'n to Summ. J. at 8. Nonetheless, the County assigned her a starting salary over $10,000 lower than the salary it gave them. *See* RE 448.

5. Petitioner candidly concedes that it seeks to transform the Equal Pay Act into a statute that prohibits a wage gap only if it rests either explicitly on sex or on an ostensibly neutral criterion that is pretextual in fact – that is, a statute "focus[ed] on discriminatory intent." Pet. 21; *see also* Pet. 23 (calling the Equal Pay Act "an intentional discrimination provision").

Petitioner's argument flouts this Court's longstanding construction of the Equal Pay Act as a statute that does not require "proof of intentional discrimination." *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 640 (2007); *see also Corning Glass*, 417 U.S. at 205. And petitioner offers no argument for why this Court should revisit that question.

The Ninth Circuit was therefore correct in unanimously rejecting petitioner's claim that it could

pay Ms. Rizo $10,000 less per year for performing exactly the same job as her male colleagues solely on the basis of her prior salary in a different job for a different employer hundreds of miles away.

II. This case does not raise petitioner's second question presented.

The premise of petitioner's second question is that a "deceased judge[]" somehow "continue[d] to participate in the determination" of this case after he died. Pet. i. This premise defies reason. Judge Reinhardt's "participation" in this case occurred entirely during his lifetime. That the decision was not publicly announced prior to his death does not change its validity.

A. Nothing about the composition of the en banc panel requires this Court's review.

1. Petitioner does not question the legal force of the Ninth Circuit's "final" judgment. Pet. 33. It is wise not to: "[S]ettled law permits a quorum to proceed to judgment when one member of the panel dies or is disqualified." *Nguyen v. United States*, 539 U.S. 69, 82 (2003); *see also New Process Steel, L.P. v. N.L.R.B.*, 560 U.S. 674, 686 (2010). Thus, even if one vote were discarded, the continued presence of ten other Article III judges on the en banc panel would more than meet the requirement for quorum.[11] Having conceded that the judgment below is binding, petitioner's second

---

[11] An en banc panel has quorum if it is composed of the "majority of the number of judges authorized to constitute a court or panel thereof." 28 U.S.C. § 46(d). The Ninth Circuit uses eleven judge panels when sitting en banc, so quorum is met as long as six authorized judges are empaneled. *See* 9th Cir. R. 35-3; *see also* Act of Oct. 20, 1978, § 7, Pub. L. No. 95-486, 92 Stat. 1629.

question presented amounts to nothing more than an academic inquiry: Nothing about the answer to that question would change the outcome of this case. *Cf.* Pet. 33.

2. Unable to assail the judgment, petitioner quibbles instead with the first line of the opinion – specifically, the words "Reinhardt, Circuit Judge." Pet. App. 2a. Set aside, for a moment, that this Court "does not review lower courts' opinions, but their *judgments*." *Jennings v. Stephens*, 135 S. Ct. 793, 799 (2015) (emphasis in original). Set aside also that "each Court of Appeals is vested with a wide latitude of discretion to decide for itself" just how the power to review cases en banc "shall be exercised." *W. Pac. R.R. Corp. v. W. Pac. R.R. Co.*, 345 U.S. 247, 259 (1953). There remains a serious flaw in petitioner's objection: The Ninth Circuit here did exactly what this Court once did when faced with similar circumstances following the death of a Justice.

Justice Brewer died after the Court had heard and voted on *J.W. Frellsen & Co. v. Crandell*, 217 U.S. 71 (1910), but before a judgment was entered and announced publicly. *Id.* at 75. Nonetheless, his fully-completed draft was "adopted as the opinion of the court." *Id.* And he was given express attribution for the "opinion, including the preliminary statement." *Id.* This Court simply included a short addendum noting that the opinion had been fully written – and joined by all the other Justices – prior to Justice Brewer's "lamented death." *Id.*

Here, the Ninth Circuit took exactly the same approach. It explained that Judge Reinhardt had fully participated in the case, and "authored this opinion" in the period "[p]rior to his death." Pet App. 1a n.*. The

footnote also clarified that his opinion and "all concurrences were final, and voting was completed prior to his death." *Id.* Petitioner's sole retort is that in *Frellsen*, the opinion was "recirculated and again agreed to" after Justice Brewer had died. Pet. 31 (quoting *Frellsen*, 217 U.S. at 75). Petitioner does not explain why this distinction is significant, because it cannot. The footnote here informs the public that the Ninth Circuit followed a procedure parallel to the recirculation in *Frellsen*. By signing onto the footnote, the ten remaining members of the en banc panel indicated their continued adherence to their earlier positions.

Petitioner's attack on the Ninth Circuit's opinion is perverse. If it were improper for the Ninth Circuit to issue the opinion in the form that it did, then the remedy would seem to be to take Judge Reinhardt's name off the list of judges who sat on the en banc panel. But that would mean that the opinion that appears on pages 2a to 28a of the Petition Appendix would no longer be an opinion of the court announcing a binding rule for future cases. Reaching petitioner's first question presented would therefore do nothing more than "give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Imp. Co. v. Coty*, 262 U.S. 159, 163 (1923). That is not why this Court grants certiorari. *Id.* [12]

---

[12] The opinion would not declare a binding rule because it would have the support of only five of ten judges. Under the rules of *Marks v. United States*, 430 U.S. 188, 193 (1977), and *Bradley v. Henry*, 518 F.3d 657, 658 (9th Cir. 2008), this Court would therefore have to parse the four opinions below to determine what rule garnered a majority of the judges' votes.

B. A judge's participation in a case ends when he has voted and finalized his opinion.

In any event, the facts of this case do not present any question as to whether deceased judges can "participate in a decision." Pet. 33. Since the time of *Marbury v. Madison*, our law has recognized that when a high government official completes performance of an official act, that act remains valid even if he leaves office before his bureaucratic staff performs any final ministerial functions required to promulgate it. 1 Cranch (5 U.S.) 137, 158-59 (1803).

A clerk entering a finalized opinion is a canonical example of a ministerial task. *See United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 232-33 (1958); *Comm'r v. Estate of Bedford*, 325 U.S. 283, 286 (1945). There is no disagreement among the circuits on this matter. *See, e.g., United States v. Hunt*, 513 F.2d 129, 137 (10th Cir. 1975); *Forstner Chain Corp. v. Marvel Jewelry Mfg. Co.*, 177 F.2d 572, 576 (1st Cir. 1949).

Thus, a judge's death or resignation will not vitiate an opinion once it is final – that is, once an opinion "evidences the judge's intention that it shall be his final act in the case." *F. & M. Schaefer Brewing Co.*, 356 U.S. at 234. This Court does not require that a judge perform any "peculiar formal act" to signify the end of his participation in a case, provided that his

---

Because the concurrences took different approaches to explaining precisely why petitioner's policy did not satisfy Section 206(d)(1)(iv), it is not entirely clear what the narrowest grounds would be. And figuring that out is hardly an appropriate use of this Court's time.

intention is sufficiently clear. *United States v. Hark*, 320 U.S. 531, 534 (1944).

This approach makes sense. Under petitioner's logic, if a judge were to suffer a heart attack after sending her opinion to the clerk's office, mere seconds before the clerk entered the opinion onto the public docket, the entire case would have to be heard anew. This cannot be right. Requiring a new proceeding on facts like these would be an absurd waste of judicial resources, and deeply unfair to the parties.

Here, the Ninth Circuit, on the basis of its knowledge of facts that petitioner does not dispute, explained that the opinions, concurrences, and voting were all "final" prior to Judge Reinhardt's death. Pet. App. 1a n.*. All that remained was for the Clerk of the Ninth Circuit to "prepare, sign, and enter the judgment." Fed. R. App. P. 36. Because these tasks are purely ministerial, Judge Reinhart's participation in the case was complete before he died.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Daniel M. Siegel
Counsel of Record
SIEGEL, YEE & BRUNNER
475 14th Street, Suite 500
Oakland, CA 94612
(510) 839-1200
DanSiegel@siegelyee.com

November 5, 2018

No. 18-272

IN THE

Supreme Court of the United States

FRESNO COUNTY SUPERINTENDENT OF SCHOOLS,

Petitioner,

v.

AILEEN RIZO,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

Benjamin M. Flowers
JONES DAY
325 John H. McConnell Blvd., Suite 600
Columbus, OH 43215

Elizabeth B. McRee
JONES DAY
77 West Wacker
Chicago, IL 60601

Shay Dvoretzky
Counsel of Record
Jeffrey R. Johnson
Cormac A. Early
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

Counsel for Petitioner Fresno County Superintendent of Schools

(additional counsel listed on inside cover)

Michael G. Woods
Timothy J. Buchanan
McCormick, Barstow,
Sheppard, Wayte &
Carruth LLP
7647 North Fresno Street
Fresno, CA 93720

(continued from front cover)

QUESTIONS PRESENTED

1. The Equal Pay Act permits employers to pay men and women different wages for the same work "where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." 29 U.S.C. § 206(d)(1). Is prior salary a "factor other than sex"?

2. May deceased judges continue to participate in the determination of cases after their deaths?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. THIS COURT SHOULD DECIDE WHETHER EMPLOYERS MAY CONSIDER PRIOR SALARY 1

A. This case implicates an acknowledged circuit split 1

B. The question presented is important 7

C. Prior pay is a "factor other than sex." 8

II. DECEASED JUDGES CANNOT DECIDE CASES 9

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

CASES

Aldrich v. Randolph Cent. Sch. Dist.,
963 F.2d 520 (2d Cir. 1992) 6

Beck-Wilson v. Principi,
441 F.3d 353 (6th Cir. 2006) 6

Covington v. S. Illinois Univ.,
816 F.2d 317 (7th Cir. 1987) 2, 4

Dey v. Colt Const. & Dev. Co.,
28 F.3d 1446 (7th Cir. 1994) 4

Drum v. Leeson Elec. Corp.,
565 F.3d 1071 (8th Cir. 2009) 5

Encino Motorcars, LLC v. Navarro,
138 S. Ct. 1134 (2018) 8

Fallon v. Illinois,
882 F.2d 1206 (7th Cir. 1989) 4

Glenn v. Gen. Motors Corp.,
841 F.2d 1567 (11th Cir. 1988) 6

Irby v. Bittick,
44 F.3d 949 (11th Cir. 1995) 6

J.W. Frellsen & Co. v. Crandell,
217 U.S. 71 (1910) 11

Lauderdale v. Ill. Dep't of Human Servs.,
876 F.3d 904 (7th Cir. 2017) 3

Nguyen v. United States,
539 U.S. 69 (2003) 11

TABLE OF AUTHORITIES
(continued)

Page(s)

Sandifer v. U.S. Steel Corp.,
571 U.S. 220 (2014) 8

Taylor v. White,
321 F.3d 710 (8th Cir. 2003) 1, 4, 5

United States v. Am.-Foreign Steamship Corp.,
363 U.S. 685 (1960) 9, 10

Wernsing v. Dep't of Human Servs.,
427 F.3d 466 (7th Cir. 2005) 1, 2, 3, 4

STATUTES

28 U.S.C. § 46 ..... 10, 11

ARGUMENT

The Court should grant certiorari on both questions presented and reverse.

I. THIS COURT SHOULD DECIDE WHETHER EMPLOYERS MAY CONSIDER PRIOR SALARY.

Respondent Aileen Rizo argues that this case does not implicate the admitted circuit split on the first question presented, that the split is unimportant, and that the Ninth Circuit did not err. Each argument fails.

A. This case implicates an acknowledged circuit split.

Rizo does not dispute that there is a circuit split on the meaning of the Equal Pay Act's catch-all defense. Indeed, she expressly relied on the circuit split in seeking en banc review before the Ninth Circuit. *See* Rehearing Pet. 7 n.3. The EEOC acknowledged it, too. *See* EEOC Rehearing Amicus 6. So did the Ninth Circuit, joining several of its sister circuits in doing so. Pet.App.21a & n.15; *Taylor v. White*, 321 F.3d 710, 720 (8th Cir. 2003); *Wernsing v. Dep't of Human Servs.*, 427 F.3d 466, 468 (7th Cir. 2005).

That leaves only the question whether this case *implicates* the split. It does. Rizo wins as a matter of law under the rules in the Ninth, Tenth, and Eleventh Circuits; Petitioner would win as a matter of law in the Seventh and Eighth Circuits; and Petitioner would *at least* be entitled to trial in the Second and Sixth Circuits. Pet. 15–16. Rizo nevertheless claims that the circuits unanimously agree that prior pay is not a "factor other than sex" when it is the *on-*

ly factor on which the employer relies to justify a pay disparity. BIO 12. That is not what the cases say.

1. In the Seventh and Eighth Circuits, prior pay, as used in this case, is a "factor other than sex," even when it is considered by itself.

Seventh Circuit. The Seventh Circuit stated this rule unequivocally in *Wernsing*, 427 F.3d at 468. According to Rizo, however, the Seventh Circuit allows employers to rely on prior salary in cases involving internal transfers, but not new hires from different employers. This contention misreads both *Wernsing* and *Covington v. Southern Illinois University*, 816 F.2d 317 (7th Cir. 1987).

Covington held that the Equal Pay Act does *not* require employers to give a business justification for relying on prior pay—as *Wernsing* reaffirmed twenty years later. *Compare id.* at 322, *with* 427 F.3d at 469–70. In doing so, *Covington* gave several reasons for rejecting out-of-circuit cases that had adopted a business-justification rule. One reason was that those circuits were concerned that relying on prior pay "may serve to perpetuate an employee's wage level that has been depressed because of sex discrimination by a *previous employer*." 816 F.2d at 322 (emphasis added). The issue in *Covington*, the court explained, was "somewhat different" from those cases: "whether [an employer] can consider the prior wages that *it* paid an employee, rather than the wages paid by a previous employer." *Id.* at 322–23. So the court was simply noting a factual distinction, not adopting a legal rule.

Wernsing later rejected the business-justification rule even more forcefully. Judge Easterbrook stated

the court's holding categorically: "Wages *at one's prior employer* are a 'factor other than sex,'" and the employer's reason for using that factor "need not be related to the requirements of the particular position in question, nor must it even be business-related." 427 F.3d at 468, 470 (emphasis added). *Wernsing* mocked the courts that had adopted a business-justification requirement, characterizing the rule as a judge-issued "ukase." *Id.* at 468–69. This reasoning—applicable to pay from a "prior employer" or the same employer, in "both [the] public and private" sectors, *id.* at 467—reflects that nothing in the Equal Pay Act permits drawing an arbitrary distinction between new hires and internal transfers. It also reflects *Wernsing*'s facts. Rizo is wrong to describe *Wernsing* as involving an internal transfer—it involved one government agency's reliance on a new hire's prior pay at a *different* agency. *Id.* at 467 (Office of Inspector General at Illinois Department of Human Services based salary entirely on prior pay at Southern Illinois Enforcement Group). And if there were any remaining doubt that the Seventh Circuit rejects Rizo's internal-transfer–new-hire distinction, in its latest word on the issue, the Seventh Circuit held that prior pay was a factor other than sex in a case involving a male comparator whose higher salary was based on his pay *with a different employer*. *See Lauderdale v. Ill. Dep't of Human Servs.*, 876 F.3d 904, 906, 908–09 (7th Cir. 2017).

Of course, even if the Seventh Circuit had adopted the business-justification rule in the new-hire context, that would not align it with the Ninth Circuit. It would instead align it (in the new-hire context) with the Second and Sixth Circuits. Those courts, as

explained below, would not have ordered the same relief as the Ninth Circuit in this case.

Finally, Rizo makes much of a separate passage from *Covington*: "We do not believe that the EPA precludes an employer from implementing a policy aimed at improving employee morale when there is no evidence that the policy is either discriminatorily applied or has a discriminatory effect." 816 F.2d at 322. Rizo excerpts portions of this sentence to make it appear as though *Covington* adopted a rule forbidding considering prior pay if doing so has a disparate impact. BIO 19. For a while after *Covington*, the circuit expressed some confusion about the role of a disparate-impact analysis. *See Fallon v. Illinois*, 882 F.2d 1206, 1211 n.4 (7th Cir. 1989); *Dey v. Colt Const. & Dev. Co.*, 28 F.3d 1446, 1462 (7th Cir. 1994). But *Wernsing* resolved that confusion: "the Equal Pay Act deals exclusively with disparate treatment. It does not have a disparate-impact component." 427 F.3d at 469.

Eighth Circuit. The Eighth Circuit similarly holds that prior salary can be a "factor other than sex," even when it is considered by itself. *See Taylor*, 321 F.3d 710.

Rizo dismisses *Taylor*, claiming it involved a "salary retention" policy, rather than a policy of considering prior pay from different employers. BIO 16–17. Again, that distinction appears nowhere in the Equal Pay Act. Nor does it appear in the Eighth Circuit's decision. *Taylor* consistently referred to "prior salary or salary retention policies," and its reasoning applied with equal force to both: "we reach the same conclusion as the Seventh Circuit which refused to adopt a per se rule that would exclude salary reten-

tion *or past salary* as qualifying 'factors other than sex.'" 321 F.3d at 719 (citing *Covington*, 816 F.2d at 322-23) (emphasis added). The court held that the proper inquiry for *all* facially neutral policies under the catch-all defense is limited to a "search for evidence that contradicts an employer's claims of gender neutrality." *Id.* Rizo does not dispute that Petitioner would win summary judgment under that standard.

Rizo also points to *Drum v. Leeson Electric Corp.*, 565 F.3d 1071 (8th Cir. 2009) (cited at BIO 17), but that decision is consistent with *Taylor*. As in *Taylor*, the court in *Drum* recognized that employers *can* rely on prior salary. *Id.* at 1073. And as in *Taylor*, it recognized that they cannot do so as a pretext—they cannot, for example, use prior salary to "justify lower wages for female employees simply because the market might bear such wages." *Id.* (citing *Taylor*, 321 F.3d at 718). The court went on to hold that the record before it was too underdeveloped to establish whether the pay differential resulted from a valid prior-salary policy or something else; on that basis, it reversed the lower court's summary-judgment award. *Id.* It never, however, suggested that reliance on prior salary—even by itself—is per se improper, as the Ninth Circuit held below.

2. That suffices to establish a certworthy split: Petitioner would have won as a matter of law in the Seventh and Eighth Circuits, but lost as a matter of law in the Ninth. The split, however, is even deeper than that. The Second and Sixth Circuits, unlike the Ninth Circuit, also permit employers to consider prior salary, even by itself. But unlike the Seventh and Eighth Circuits, they insist upon a "legitimate" busi-

ness justification for doing so. *See Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 526 (2d Cir. 1992); *Beck-Wilson v. Principi*, 441 F.3d 353, 365 (6th Cir. 2006).

Rizo does not disagree. Instead, she argues that business-related justifications must relate to job performance, not to other business-related concerns. BIO 13–14. That is irrelevant to whether there is a split: whatever a business-related justification is, employers who prove that they have such a justification for relying on prior pay alone can do so. It also does nothing to undermine the rule's relevance to this case. Whereas the Ninth Circuit's rule entitled Rizo to summary judgment, the Second and Sixth Circuits' rule would *at least* permit Petitioner to proceed to trial, where it could introduce evidence of a business-related justification for the prior-pay policy. Indeed, that is precisely what the Ninth Circuit panel held when it applied that court's earlier decision in *Kouba*, which followed the Second and Sixth Circuit's approach. Pet.App.61a.

3. Finally, Rizo minimizes the substantial differences in approach between the Ninth Circuit and the Tenth and Eleventh Circuits, the two courts that would reach the same bottom-line result in this case.

Rizo concedes that the Eleventh Circuit permits consideration of prior salary as a "factor other than sex," so long as it is considered in conjunction with other factors. *See Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1571 n.9 (11th Cir. 1988); *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995) ("[T]here is no prohibition on utilizing prior pay as part of a mixed-motive, such as prior pay *and* more experience.") She concedes the Tenth Circuit does as well. BIO

14–15. And though she argues that the Tenth Circuit additionally requires a business-related justification for considering prior salary, BIO 14, that has no bearing on the split's relevance to this case: because the salary differential that Rizo challenges is based on prior salary alone, she is entitled to summary judgment in the Ninth, Tenth, and Eleventh Circuits, but *not* in the Second, Sixth, Seventh, or Eighth Circuits.

B. The question presented is important.

Employers across the country consider new employee's prior salaries when setting their pay. *See* Br. for Amici Curiae The Chamber of Commerce of the United States, et al., 9. But Rizo insists that the issue is unimportant, at least "within the Ninth Circuit," because seventy percent of firms in that circuit are located in states that forbid reliance on prior pay. BIO 21.

This argument makes no sense on its own terms; a rule that applies to the hiring decisions of 30 percent of firms in the nation's largest circuit is quite important. Anyway, the relevant question is the issue's importance to the nation as a whole, not "within the Ninth Circuit." And on that score, its importance cannot be disputed. Rizo identifies no state or local laws forbidding employers from considering prior pay aside from California, Oregon, Hawaii, "Massachusetts, Delaware, Puerto Rico, and several major cities." BIO 22. Indeed, several states have explicitly *rejected* such legislation and have *prohibited* their municipalities from enacting it. Br. of Chamber of Commerce 6–7. There are many people in the many miles between California and Massachusetts, and the question presented is important to them.

Rizo finally insists that businesses *can* rely on prior pay even under the Ninth Circuit's rule—as long as doing so creates no pay disparities between men and women. BIO 22–23. That is just a creative way of forbidding reliance on prior pay; if you do, and if it creates a disparity, you have violated the Act.

C. Prior pay is a "factor other than sex."

The Equal Pay Act forbids pay disparities between men and women, subject to four exceptions. The final, catch-all exception is as broad as it is clear: differences in payment are permissible when they are "made pursuant to ... a differential based on any other factor other than sex." Prior pay is not the same thing as sex, and so a pay disparity resting on prior pay is a "differential based on any other factor other than sex." It follows that employers may rely on prior pay, even by itself, without violating the Equal Pay Act.

Rizo's counterarguments are wrong. First, she says that "exceptions" to the Equal Pay Act "are 'narrowly construed against the employers seeking to assert them.'" BIO 25 (quoting *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 232 n.7 (2014)). There is no such principle. The quote from *Sandifer* discusses the "exemptions" codified in § 213 of the Fair Labor Standards Act. 571 U.S. at 232 n.7. And it doesn't even apply *there* anymore: this Court rejected it in *Encino Motorcars, LLC v. Navarro*, because it rests "on the flawed premise that the FLSA pursues its remedial purposes at all costs." 138 S. Ct. 1134, 1142 (2018).

Rizo says her narrow reading is justified by the *noscitur a sociis* and *ejusdem generis* canons, under

which the broad catch-all exception should be read to cover only the same types of factors as the three specific exceptions that precede it. According to Rizo, this means that it covers only "legitimate, job-related factors." BIO 25 (quoting Pet.App.10a). This argument fails on its own terms, because prior pay *is* a legitimate, job-related factor. Pet.17–19; Pet.App. 58a. Anyway, the more obvious similarity between the specifically enumerated exceptions is that each is sex-neutral—each specifically enumerates a factor besides sex. Pet. 24. Reading the catch-all provision to include all sex-neutral factors, including prior pay, thus comports with Rizo's canons *and* the text's plain meaning.

Rizo also argues that Petitioner's reading makes the specifically enumerated exceptions superfluous, since they would all fall under a broad any-other-factor provision. BIO 26. Rizo's own reading has the same problem: if the three specific exceptions all involve legitimate, job-related factors, reading the broad catch-all to cover all such factors makes the first three exceptions in some sense superfluous. The surplusage canon is thus irrelevant.

II. DECEASED JUDGES CANNOT DECIDE CASES.

A. This case presents the additional question whether the en banc Ninth Circuit erred by issuing a decision that included Judge Reinhardt's vote eleven days after his death. This Court's decision in *United States v. American-Foreign Steamship Corp.*, 363 U.S. 685 (1960), resolves that question: the answer is "yes."

In *American-Foreign*, this Court addressed the meaning of 28 U.S.C. § 46 as it existed in 1960. That statute governed the composition of en banc panels, just as it does today. And just as it does today, the statute required that cases and controversies "be heard *and determined* by" en banc panels consisting of "circuit judges" in "active service." *Id.* (emphasis added). (Congress has amended the law to permit non-active judges to sit in limited circumstances, but the amendments are irrelevant here.) In *American-Foreign*, the Second Circuit had counted the vote of a judge who sat on the en banc panel while still an active judge, but who retired before judgment issued. The Court held that this violated the statute. Section 46 says that cases must be "determined" by en banc panels consisting exclusively of "circuit judges in regular active service." A case is "'determined' when it is decided." *American-Foreign*, 363 U.S. at 688. Since the retired judge was no longer in active service on the date of the decision, the panel was improperly composed. *Id.*

It follows that the en banc panel was improperly composed when the Ninth Circuit "decided" this case: Judge Reinhardt was no longer in "regular active service" when the court issued its decision. *Id.*

B. Rizo does not even cite *American-Foreign*, thereby forfeiting any argument that it is inapplicable. Instead, she raises several issues that are irrelevant to the suitability of this issue for Supreme Court review.

First, Rizo argues that the question is purely academic, since the Ninth Circuit will just reenter the same judgment with a properly composed panel. BIO 29–30. This Court has not previously consid-

ered the likelihood of a different judgment when vacating judgments issued by improperly constituted courts—the improper composition of the court is a harm unto itself. *See, e.g.*, *Nguyen v. United States*, 539 U.S. 69, 82–83 (2003) (vacating unanimous judgment by appellate panel that included one ineligible judge). In any event, because Judge Reinhardt cast the dispositive vote for the Ninth Circuit's broad rule, vacating the judgment would have a material effect on the rule in the Ninth Circuit.

Second, Rizo claims that the Ninth Circuit here did exactly what this Court did in *J.W. Frellsen & Co. v. Crandell*, 217 U.S. 71 (1910). But *J.W. Fresllsen* did not involve § 46, which applies only to courts of appeals. Rizo's description of *J.W. Fresllsen* is also wrong: the Court in that case "recirculated and again agreed to" to an opinion that Justice Brewer wrote before his death. *Id.* at 75. But unlike Judge Reinhardt, Justice Brewer did not *continue* to participate after his death; Chief Justice Fuller, while crediting Justice Brewer for his work, delivered the opinion for the court. *Id.*

Finally, Rizo insists that there is a ministerial exception to § 46's requirements, under which a case is considered decided once the clerk is asked to "prepare, sign, and enter the judgment." BIO 33 (quoting Fed. R. App. P. 36). Assuming for the sake of argument that this is true, the exception does not apply here: Judge Reinhardt died *eleven days* before the decision in this case. There is no evidence that the Ninth Circuit had already transmitted its decision to the clerk more than eleven days before the decision issued—and the Ninth Circuit was curiously silent on that point when explaining all of the other events

that transpired before Judge Reinhardt's passing. Pet.App.1a n*.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

November 19, 2018

Respectfully submitted,

Benjamin M. Flowers
JONES DAY
325 John H. McConnell Blvd., Suite 600
Columbus, OH 43215

Elizabeth B. McRee
JONES DAY
77 West Wacker
Chicago, IL 60601

Michael G. Woods
Timothy J. Buchanan
MCCORMICK, BARSTOW, SHEPPARD, WAYTE & CARRUTH LLP
7647 North Fresno Street
Fresno, CA 93720

Shay Dvoretzky
Counsel of Record
Jeffrey R. Johnson
Cormac A. Early
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
Tel.: (202) 879-3939
sdvoretzky@jonesday.com

Counsel for Petitioner Fresno County Superintendent of Schools

No. 18-272

IN THE

Supreme Court of the United States

FRESNO COUNTY SUPERINTENDENT OF SCHOOLS,
Petitioner,

v.

AILEEN RIZO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF THE CENTER FOR WORKPLACE COMPLIANCE AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONER

KAREN R. HARNED
ELIZABETH MILITO
NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER
1201 F Street, N.W.
Suite 200
Washington, DC 20004
(202) 406-4443

Attorneys for *Amicus Curiae* National Federation of Independent Business Small Business Legal Center

RAE T. VANN
Counsel of Record
DANNY E. PETRELLA
NT LAKIS, LLP
1501 M Street, N.W.
Suite 1000
Washington, DC 20005
rvann@ntlakis.com
(202) 629-5600

Attorneys for *Amicus Curiae* Center for Workplace Compliance

October 2018

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICI CURIAE*	2
STATEMENT OF THE CASE	4
SUMMARY OF REASONS FOR GRANTING THE WRIT	7
REASONS FOR GRANTING THE WRIT	9
I. REVIEW OF THE DECISION BELOW IS NEEDED TO RESOLVE ISSUES OF SUBSTANTIAL IMPORTANCE TO THE EMPLOYER COMMUNITY	9
A. The Decision Below Conflicts With The Plain Text Of The Equal Pay Act, Which Provides That A Pay Differential Based On Any Factor Other Than Sex Is Lawful	9
B. The Decision Below Is Inconsistent With This Court's Decision In *County of Washington v. Gunther*	12
C. Every Court Of Appeals To Consider This Issue, Save The Ninth Circuit, Has Determined That Prior Salary Can Constitute A "Factor Other Than Sex" Under The Equal Pay Act	13
D. If Permitted To Stand, The Decision Below Will Have A Profound, Largely Negative Impact On Employers Nationwide	15

TABLE OF CONTENTS—Continued

Page

1. Ensuring nondiscrimination in compensation does not require ensuring all employees are paid the same 15
2. The Equal Pay Act does not impose an affirmative obligation on employers to identify or "cure" the effects of the gender wage gap..... 17

CONCLUSION 20

TABLE OF AUTHORITIES

FEDERAL CASES — Page(s)

Aldrich v. Randolph Central School District, 963 F.2d 520 (2d Cir. 1992) 14

Beck-Wilson v. Principi, 441 F.3d 353 (6th Cir. 2006) 14

Behm v. U.S., 68 Fed. Cl. 395 (2005) 15

Corning Glass Works v. Brennan, 417 U.S. 188 (1974) 10, 12

County of Washington v. Gunther, 452 U.S. 161 (1981) 10, 12, 13

Fallon v. Illinois, 882 F.2d 1206 (7th Cir. 1989) 10

Irby v. Bittick, 44 F.3d 949 (11th Cir. 1995) 14

Kouba v. Allstate Insurance Co., 691 F.2d 873 (9th Cir. 1982), *overruled by Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018), *petition for cert. filed*, No. 18-272 (U.S. Aug. 30, 2018) 5, 6

Lauderdale v. Illinois Department of Human Services, 876 F.3d 904 (7th Cir. 2017) 13

Ricci v. DeStefano, 557 U.S. 557 (2009) 16

Riser v. QEP Energy, 776 F.3d 1191 (10th Cir. 2015) 14

Rudebusch v. Hughes, 313 F.3d 506 (9th Cir. 2002) 17

Smith v. City of Jackson, 544 U.S. 228 (2005) 11, 16

TABLE OF AUTHORITIES—Continued

Page(s)

Taylor v. White, 321 F.3d 710 (8th Cir. 2003) 10, 13, 14

FEDERAL STATUTES

Equal Pay Act,
29 U.S.C. § 206(d) ..... *passim*
29 U.S.C. § 206(d)(1) 3, 7, 10

Fair Labor Standards Act,
29 U.S.C. §§ 201 *et seq.* 3

Title VII of the Civil Rights Act of 1964,
42 U.S.C. §§ 2000e *et seq.* ..... *passim*

OTHER AUTHORITIES

Christianne Corbett, M.A. & Catherine Hill, Ph.D, American Association of University Women, *Graduating to a Pay Gap* (October 2012) 18

CONSAD Research Corp., *An Analysis of Reasons for the Disparity in Wages Between Men and Women* (January 2009) 18

Dr. Andrew Chamberlain, Chief Economist, Glassdoor, *Demystifying the Gender Pay Gap* (March 2016) 18, 19

IN THE

Supreme Court of the United States

No. 18-272

FRESNO COUNTY SUPERINTENDENT OF SCHOOLS,

Petitioner,

v.

AILEEN RIZO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF THE CENTER FOR WORKPLACE COMPLIANCE AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONER

The Center for Workplace Compliance (CWC) and National Federation of Independent Business Small Business Legal Center (NFIB) respectfully submit this brief *amici curiae* with the consent of the parties. The brief supports the petition for a writ of certiorari.[1]

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae's* intention to file this brief. All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and

INTEREST OF THE *AMICI CURIAE*

Founded in 1976, the Center for Workplace Compliance (CWC) (formerly the Equal Employment Advisory Council (EEAC)) is the nation's leading nonprofit association of employers dedicated exclusively to helping its members develop practical and effective programs for ensuring compliance with fair employment and other workplace requirements. Its membership includes over 240 major U.S. corporations, collectively providing employment to millions of workers. CWC's directors and officers include many of industry's leading experts in the field of equal employment opportunity and workplace compliance. Their combined experience gives CWC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of fair employment policies and requirements.

The National Federation of Independent Business (NFIB) Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents businesses nationwide.

---

no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

The NFIB Small Business Legal Center represents the interests of small business in the nation's courts and participates in precedent setting cases that will have a critical impact on small businesses nationwide, such as the case before the Court in this action.

Most of *amici's* members are employers, or representatives of employers, subject to the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, as amended by the Equal Pay Act (EPA), 29 U.S.C. § 206(d), and other federal employment laws and regulations. As representatives of potential defendants to EPA compensation discrimination charges and lawsuits, *amici's* members have a substantial interest in the issue presented in this matter regarding the proper scope of the statute's "any other factor other than sex" affirmative defense. 29 U.S.C. § 206(d)(1). The Ninth Circuit erroneously held that a pay disparity resulting from the application of a facially-neutral system that considers prior salary in setting initial pay is not a "factor other than sex" under the EPA, and thus is unlawful.

As national representatives of businesses and professionals whose responsibilities include compliance with equal employment opportunity laws and regulations, *amici* have perspectives and experience that can help the Court assess issues of law and public policy raised in this case beyond the immediate concerns of the parties. Since 1976, CWC and/or NFIB have participated as *amicus curiae* in hundreds of cases before this Court and the federal courts of appeals involving significant issues of employment law. Because of their practical experience in these matters, *amici* are well situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers generally.

STATEMENT OF THE CASE

After relocating to the area from Maricopa County, Arizona, Respondent Aileen Rizo was hired in 2009 to serve as a math consultant for the Fresno County, California Office of Education (County) at an annual salary of $62,733 – $62,133 in base pay plus a master's degree stipend of $600. Pet. App. 5a. Her initial pay was determined using the County's standardized salary schedule known as "standard operation procedure 1440" (SOP 1440), under which management-level employees are placed in the salary level that most closely corresponds to their prior salary, increased by five percent. *Id.* SOP 1440 is entirely gender-neutral and has been applied in a nondiscriminatory manner, resulting in some men, and some women, being paid more than their similarly situated peers. Pet. 3-4.

Rizo lobbied the County for a pay adjustment after learning that a recently-hired male math consultant was placed in a higher salary level. Pet. App. 5a. After conducting an extensive pay analysis of current management employees hired over the past 25 years in the same or similar position as Rizo, the County confirmed that SOP 1440 had been applied consistently and in a nondiscriminatory manner, and that in fact, more females had been placed at higher steps than males. *Id.* It thus declined to adjust Rizo's pay. *Id.*

Rizo was dissatisfied with the County's results, believing that on average, men were placed at a higher level than females. *Id.* She sued the County, claiming that the difference in pay between her and her male peers was unjustified and thus violated the Equal Pay Act (EPA), 29 U.S.C. § 206(d), and Title VII of the Civil

Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq*. *Id.* at 5a-6a.

The County moved for summary judgment, arguing that Rizo's salary, though admittedly less than her male colleagues, was set in accordance with SOP 1440 and thus was based on "any other factor other than sex." *Id.* at 6a. The County pointed out that application of SOP 1440 was rooted in four sound business reasons: it (1) was objective; (2) encouraged candidates to leave their current jobs by providing a five percent pay increase over their current salary; (3) prevented favoritism and ensured consistency; and (4) was a "judicious use of taxpayer dollars." *Id.* at 58a.

In denying the County's motion for summary judgment, the district court concluded that prior salary alone never can be a factor "other than sex" under the EPA. *Id.* at 84a-85a. It reasoned that "a pay structure based exclusively on prior wages is so inherently fraught with the risk ... that it will perpetuate a discriminatory wage disparity between men and women that it cannot stand, even if motivated by a legitimate nondiscriminatory business purpose." *Id.* at 6a, 84a-85a. Recognizing its apparently direct conflict with binding Ninth Circuit precedent, however, the district court certified its ruling for interlocutory appeal. *Id.* at 6a.

On the County's appeal, a three-judge panel reversed, relying principally on the Ninth Circuit's 1982 decision in *Kouba v. Allstate Insurance Co.*, 691 F.2d 873 (9th Cir. 1982), *overruled by Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018), *petition for cert. filed*, No. 18-272 (U.S. Aug. 30, 2018). *Id.* at 6a-7a. There, it held that a pay differential based on use of prior salary can be a permissible "factor other than sex," so long as

it "effectuate[s] some business policy," and is used "reasonably in light of the employer's stated purpose as well as its other practices." *Id.* at 58a. The panel concluded that *Kouba* is dispositive to resolution of this case, pointing out, "We do not agree with the district court that *Kouba* left open the question of whether a salary differential based solely on prior earnings violates the Equal Pay Act. To the contrary, that was exactly the question presented and answered in *Kouba*." *Id.* at 59a. It thus reversed the district court's ruling and remanded the case for a determination on whether the County used prior salary "reasonably in light of its stated purpose." *Id.* at 60a.

Rizo filed a petition for rehearing *en banc*, which the Ninth Circuit granted to "clarify the law" and further assess "the vitality and effect of *Kouba*." *Id.* at 7a. The *en banc* court reversed summary judgment for the County, concluding that a legitimate "factor other than sex" under the Equal Pay Act "must be job related and that prior salary cannot justify paying one gender less if equal work is performed." *Id.* at 13a. It found that "prior salary alone or in combination with other factors cannot justify a wage differential," *id.* at 2a, because in its view, reliance on prior salary would further perpetuate the gender wage gap. Accordingly, because prior salary cannot "constitute a 'factor other than sex,' the County fails as a matter of law to set forth an affirmative defense [to liability under the Equal Pay Act]." *Id.* at 4a. The County filed a Petition for a Writ Certiorari with this Court on August 30, 2018. *Yovino v. Rizo*, No. 18-272 (U.S. Aug. 30, 2018).

SUMMARY OF REASONS FOR GRANTING THE WRIT

The Equal Pay Act of 1963 (EPA), 29 U.S.C. § 206(d), bars employers from paying men and women performing substantially similar jobs in the same establishment different rates of pay, unless the employer can demonstrate that the pay differential is based on one of four specific affirmative defenses, including "any other factor other than sex." 29 U.S.C. § 206(d)(1). The Ninth Circuit below held that when an employer sets a new employee's starting pay pursuant to a compensation system that relies, in part, on the individual's prior salary, any resulting pay differential between men and women is not based on a "factor other than sex" – and thus is unlawful – under the EPA. That holding is incorrect. Since prior salary is facially nondiscriminatory, it falls squarely within the scope of the EPA's "factor other than sex" affirmative defense. Indeed, neither the EPA nor Title VII requires any employer to redress pay differentials that are caused by something other than its own discriminatory employment practices. Any suggestion to the contrary has no basis in the law.

A compensation system such as the County's, which was applied consistently to all employees—including Respondent's male comparators—provides a complete explanation for the disparity at issue, and that explanation is, on its face, a "factor other than sex." Like countless other employers, the County compensates its employees based on and within specified pay ranges. Under longstanding policy, where prior salary plus a nondiscretionary, automatic five percent increase did not place a new hire within the County's specified pay range, employees like Respondent were

provided an even greater increase to ensure that they were compensated within range.

Thus, the County's application of its compensation system (and the system itself) is nondiscriminatory, resulting in women sometimes earning less than men, but also men sometimes earning less than women. Whether reliance on prior salary caused any particular disparity is immaterial, as that factor is not, and cannot be, considered a proxy for sex.

The Ninth Circuit's decision below therefore rests on a legally flawed premise – that an employer has an affirmative obligation under the EPA to eliminate disparities in pay, even when those disparities are caused by gender-neutral compensation policies. In other words, the Ninth Circuit rests its holding on the notion that prior salary cannot be a "factor other than sex" because it perpetuates the effects of past discrimination and what is commonly known as the "gender wage gap."

While the existence of a persistent, global gender pay gap is undeniable, so too is the fact that there are numerous causes for the gap, and no research exists that can fully account for the disparity, much less isolate unlawful sex discrimination as the sole cause. Indeed, numerous legal and practical challenges would arise if employers were expected to make individual, gender-based compensation decisions designed to "cure" the national gender wage gap.

For those reasons, the decision below not only impermissibly conflicts with the EPA's plain text as interpreted by this Court and every other court of appeals to have considered the issue, but it also creates unwarranted uncertainty for employers nationwide as to the validity of their facially nondiscriminatory

compensation policies and systems. Review of the decision below is needed to provide a clear and consistent standard that both the courts and employers may follow in developing, evaluating, and implementing nondiscriminatory, gender-neutral compensation policies.

REASONS FOR GRANTING THE WRIT

I. REVIEW OF THE DECISION BELOW IS NEEDED TO RESOLVE ISSUES OF SUBSTANTIAL IMPORTANCE TO THE EMPLOYER COMMUNITY

A. The Decision Below Conflicts With The Plain Text Of The Equal Pay Act, Which Provides That A Pay Differential Based On Any Factor Other Than Sex Is Lawful

The Equal Pay Act of 1963 (EPA), 29 U.S.C. § 206(d), prohibits employers from differentiating in pay based on sex. It provides:

> No employer having employees subject to any provisions of this section shall discriminate ... between employees *on the basis of sex* by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) *a differential based on any other factor other than sex.*

29 U.S.C. § 206(d)(1) (emphasis added). This Court has characterized the fourth affirmative defense as a "general catchall provision," *Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974), which "in essence 'authorizes' employers to differentiate in pay on the basis of ... *any* other factor other than sex, even though such differentiation might otherwise violate the Act." *County of Washington v. Gunther*, 452 U.S. 161, 169 (1981) (emphasis added).

As a number of courts have observed, the EPA's "any other factor" affirmative defense "embraces an almost limitless number of factors, so long as they do not involve sex." *Fallon v. Illinois*, 882 F.2d 1206, 1211 (7th Cir. 1989) (citations omitted); *see also Taylor v. White*, 321 F.3d 710 (8th Cir. 2003). Indeed:

> On its face, the EPA does not suggest any limitations to the broad catch-all "factor other than sex" affirmative defense. The more specific factors that are enumerated—seniority systems, merit systems, and systems that measure earnings by quality or quantity of output—provide examples of the type of gender-neutral factors envisioned by the legislature. The legislative history supports a broad interpretation of the catch-all exception, listing examples of exceptions and expressly noting that the catch-all provision is necessary due to the impossibility of predicting and listing each and every exception. Given this facially broad exception, we are reluctant to establish any per se limitations to the "factor other than sex" exception by carving out specific, non-gender-based factors for exclusion from the exception.

Taylor, 321 F.3d at 717-18 (citation and footnote omitted).

Not only was the EPA's "any other factor" affirmative defense intended to apply broadly to any number of non-sex-based factors affecting pay, but Congress declined to qualify or place any limitations on the meaning of "any" in this context. It did not, for instance, limit application of the catchall defense only to "reasonable," "job-related," or otherwise "legitimate" non-sex factors. *See Smith v. City of Jackson*, 544 U.S. 228, 239 n.11 (2005) (comparing ADEA's "reasonable factors other than age" to EPA's "any other factor" affirmative defense).

The Ninth Circuit disagrees. In the decision below, it characterized the EPA's "any other factor" defense as *narrow* in scope, one that must be read in the context of the statute's three other enumerated defenses – all of which have some job-related purpose or function. Viewed in that context, the court concluded that prior salary, "whether considered alone or with other factors, is not *job related* and thus does not fall within an exception to the Act that allows employers to pay disparate wages" to men and women. Pet. App. 10a (emphasis added).

In essence, according to the Ninth Circuit, because prior salary "is not a legitimate measure of work experience, ability, performance, or any other job-related quality," Pet. App. 25a, relying on it as a justification for paying men and women different wages does not square with the EPA, because it perpetuates "the very gender-based assumptions about the value of work that the Equal Pay Act was designed to end." Pet. App. 27a. In doing so, it adopted an interpretation of the "any other factor" affirmative defense that simply cannot be reconciled with the statute's plain text. *Amici* respectfully urge this Court to grant the petition, reverse the decision

below, and confirm that the plain text of the EPA does not place any restrictions on the application of the "any other factor" affirmative defense – other than the requirement that the factor in question be non-sex-based.

B. The Decision Below Is Inconsistent With This Court's Decision In *County of Washington v. Gunther*

In *County of Washington v. Gunther*, this Court held that the Bennett Amendment to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, incorporates the EPA's four affirmative defenses, including the defense for differentials based on "any other factor other than sex." 452 U.S. 161 168-70 (1981). The Court pointed out that whereas Title VII was designed not only to prohibit "'overt discrimination but also [to proscribe] practices that are fair in form, but discriminatory in operation,'" *id.* (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)), the EPA "was designed differently, to *confine the application of the act to wage differentials attributable to sex discrimination*." 452 U.S. at 170 (citation and footnote omitted) (emphasis added). Accordingly, the EPA "has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a bona fide use of 'other factors other than sex.'" *Id.* (footnote omitted); *see also Corning Glass*, 417 U.S. at 195 ("Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry ... The solution adopted was quite simple in principle: to require that 'equal work will be rewarded by equal wages'") (citation omitted).

The Ninth Circuit takes pains to sidestep this Court's reasoning in *Gunther*, suggesting it merely "supports the concept of a catchall provision limited to job-related factors." Pet. App. 20a. Its interpretation is incorrect. While this Court observed in *Gunther* that an employer's *use* of any other factor other than sex to justify a pay differential must be "bona fide," 452 U.S. at 170, the Court did not suggest that the factor *itself* must be so. Accordingly, the Ninth Circuit's declaration that "[p]rior salary, whether considered alone or with other factors, is not job related and thus does not fall within an exception to the Act," Pet. App. 10a, has no basis in the EPA or this Court's precedents.

C. Every Court Of Appeals To Consider This Issue, Save The Ninth Circuit, Has Determined That Prior Salary Can Constitute A "Factor Other Than Sex" Under The Equal Pay Act

Both the Seventh and Eighth Circuits have held that differentials based on prior salary – in other words, "a difference in pay based on the difference in what employees were previously paid ..." *Lauderdale v. Ill. Dep't of Human Servs.*, 876 F.3d 904, 908 (7th Cir. 2017) (citing *Wernsing v. Dep't of Human Servs.*, 427 F.3d 466, 468 (7th Cir. 2005)) – constitutes a "factor other than sex" under the EPA. In *Taylor v. White*, the Eighth Circuit reasoned that "[o]n its face, the EPA does not suggest any limitations to the broad catch-all 'factor other than sex' affirmative defense." 321 F.3d at 717. The Court thus explicitly rejected the argument that because it may permit the "perpetuation of unequal wage structures," *id.*, use of prior salary should be precluded as a matter of law. *Id.* at 718. Rather, reliance on prior salary is simply

one of any number of factors that the courts must consider in evaluating the viability of the employer's affirmative defense. *See, e.g., Taylor*, 321 F.3d at 718 (holding that the risks of perpetuating a pay differential "simply highlight the need to carefully examine the record in cases where prior salary or salary retention policies are asserted as defenses to claims of unequal pay").

In contrast, the Tenth and Eleventh Circuits have held that while prior salary "can be considered in determining whether pay disparity is based on a factor other than sex ..., the EPA 'precludes an employer from relying *solely* upon a prior salary to justify pay disparity.'" *Riser v. QEP Energy*, 776 F.3d 1191, 1199 (10th Cir. 2015) (citation omitted) (emphasis added); *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995) (employer's reliance on prior salary and experience justified a difference in pay). The Second and Sixth Circuits take a similar approach, permitting employers to assert the fourth affirmative defense where the factors used serve a legitimate business purpose. *See, e.g., Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 525 (2d Cir. 1992) (employer may assert a "factor other than sex" defense when the "differential pay is rooted in legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue"); *Beck-Wilson v. Principi*, 441 F.3d 353, 365 (6th Cir. 2006) (holding that a factor other than sex "does not include literally *any* other factor, but a factor that, at a minimum, was adopted for a legitimate business reason") (citing *EEOC v. J.C. Penney Co.*, 843 F.2d 249, 253 (6th Cir. 1988)).

Thus, in the Seventh and Eighth Circuits, prior salary alone can constitute a "factor other than sex." In the Tenth and Eleventh Circuits, however, prior

salary may be used to justify a gender pay disparity, but only in conjunction with other factors. In the Second and Sixth Circuits, a "factor other than sex," which would include prior salary, must serve a legitimate business purpose. And now in the Ninth Circuit, under no circumstances is prior salary considered a "factor other than sex" under the EPA. Review by this Court is warranted to bring much needed clarity to this extremely important aspect of workplace compliance.

D. If Permitted To Stand, The Decision Below Will Have A Profound, Largely Negative, Impact On Employers Nationwide

1. Ensuring nondiscrimination in compensation does not require ensuring all employees are paid the same

The mere fact that a wage disparity exists between male and female employees does not, in itself, constitute an EPA violation. Rather, the Act obligates employers to ensure that pay decisions are made for nondiscriminatory reasons, in other words, without regard to sex; it does not require they ensure across-the-board pay parity between all men and all women. Indeed, the EPA is "not the 'Pay Everyone Exactly the Same Act.'" *Behm v. U.S.*, 68 Fed. Cl. 395, 405 (2005) (citations omitted). Yet according to the Ninth Circuit, "Allowing prior salary to justify a wage differential perpetuates [the message that women are not worth as much as men], entrenching in salary systems an obvious means of discrimination—the very discrimination that the Act was designed to prohibit and rectify." Pet. App. 28a.

In other words, the Ninth Circuit assumes that the sole cause of the gender pay gap is sex discrimination and, as a result, women's prior salaries *always* will be lower than similarly situated males because of sex. Accordingly, the argument goes, because prior salary is influenced by the gender pay gap, its use is always sex-based. Even assuming that some women's prior salaries are lower than that of similarly situated males consistent with the wage gap generally, it does not follow that use of prior salary itself is inherently discriminatory.

The Ninth Circuit's position would amount to a requirement that all employers eliminate any pay disparity between genders, even those created by a gender-neutral policy – a requirement that simply does not exist under the EPA. As this Court observed in *Smith v. City of Jackson*, "in the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1), Congress barred recovery if a pay differential was based 'on any other factor' – *reasonable or unreasonable* – 'other than sex.'" 544 U.S. 228, 239 n.11 (2005) (emphasis added).

Accordingly, any notion that employers must guarantee gender pay parity in the absence of any evidence of sex-based discrimination or face liability under the EPA should be soundly rejected by this Court. So too should any notion that employers nationwide must adopt gender-based or, at the very least, "gender-conscious," compensation systems designed to achieve pay parity, regardless of any evidence of actual sex-based discrimination. In fact, forcing employers to adjust pay based on sex where no evidence of actual discrimination exists could expose employers to claims that such adjustments themselves violate Title VII. *See Ricci v. DeStefano*, 557 U.S. 557, 585 (2009);

see also Rudebusch v. Hughes, 313 F.3d 506 (9th Cir. 2002).

In both discretionary and non-discretionary compensation systems, sound business and policy reasons can exist for assigning employees different compensation. Here, those reasons were a combination of prior salary and the County's mandatory pay scale. Sometimes that system resulted in women, such as Rizo, receiving less compensation than other males, and in other instances, females were paid more than males. In each instance, objective, nondiscriminatory reasons justified the pay decisions, and the County was under no obligation to "cure" any incidental pay differences stemming from prior salary. Such a notion runs directly counter to the principles of meritocracy that form the basis of most private sector employer compensation practices in the U.S. and should be squarely rejected by this Court.

2. The Equal Pay Act does not impose an affirmative obligation on employers to identify or "cure" the effects of the gender wage gap

According to the Ninth Circuit, the use of prior salary will "allow employers to capitalize on the persistence of the wage gap[, which] would be contrary to the text and history of the Equal Pay Act, and would vitiate the very purpose for which the Act stands." Pet. App. 3a. Not only is there no affirmative obligation on employers under the EPA to "cure" the effects of the gender pay gap, but the Ninth Circuit's assumption that sex discrimination "explains" the gender pay gap is unfounded. While the existence of a persistent, global gender pay gap is undeniable, so too is the fact that there are numerous causes for the gap, and no research exists that can fully account for the

disparity, much less pin the entire disparity on unlawful sex discrimination.

For example, in January 2009 the CONSAD Research Corporation released a report commissioned by the Department of Labor entitled, *An Analysis of Reasons for the Disparity in Wages Between Men and Women*,[2] aimed at researching and quantifying the cause of the gender wage gap. The study identified numerous factors that contributed to the gap, including career choice in occupation and industry, employment interruptions mid-career, and different decisions made by men and women in balancing their work, personal, and family lives. After conducting a statistical analysis of these and other factors, an "adjusted gender wage gap" remained, estimated between 4.8 and 7.1 percent. *Id.* at 1. Other studies have produced similar results. *See, e.g.*, Christianne Corbett, M.A. & Catherine Hill, Ph.D, Am. Ass'n of Univ. Women, *Graduating to a Pay Gap* vii (Oct. 2012)[3] (concluding that "women's choices—college major, occupation, hours at work—do account for part of the pay gap[, but also that] about one-third of the gap remains unexplained" and may be the product of other factors such as negotiations and even discrimination) (quoting Foreward by Carolyn H. Garfein, AAUW President & Linda D. Hallman, CAE, AAUW Executive Director); Dr. Andrew Chamberlain, Chief Economist, Glassdoor, *Demystifying the Gender Pay Gap* 18 (Mar.

---

[2] *Available at* https://www.shrm.org/hr-today/public-policy/hr-public-policy-issues/Documents/Gender%20Wage%20Gap%20Final%20Report.pdf (last visited Oct. 3, 2018).

[3] *Available at* https://www.aauw.org/files/2013/02/graduating-to-a-pay-gap-the-earnings-of-women-and-men-one-year-after-college-graduation.pdf (last visited Oct. 3, 2018).

2016)[4] (concluding that the U.S. adjusted wage gap was 5.4% in base compensation and 7.4% in total compensation, after controlling for factors such as industry, experience, education and job title).

The "adjusted gender wage gap," is what remains of the wage gap once quantifiable characteristics such as occupation, industry, experience, and other factors are controlled for in statistical studies. Also referred to as the "unexplained" wage gap, some suggest that this unexplained gap is caused by unlawful discrimination. While there is no question that unlawful, gender-based discrimination *may* account for portions of the adjusted gender wage gap, the fact remains that no research to date has been able to quantify which portion of the gap is attributable to discrimination. More importantly, the EPA simply does not impose an obligation on employers to become social scientists and make individual, gender-based compensation decisions based on the latest research regarding the existence of a wage gap and the degree to which this gap *may* be the product of discrimination.

Employers are not obligated under any federal law to equalize their employees' starting pay to ensure perfect parity between people performing the same job. Ensuring perfect parity in compensation among all employees in a particular job group would require, for instance, that every person promoted into a job be compensated at the same rate of pay as the highest earner (likely the most experienced or best performer), thus disregarding differences in skills, knowledge, ability and/or time in job. Alternatively, employers

---

[4] *Available at* https://www.glassdoor.com/research/app/uploads/sites/2/2016/03/Glassdoor-Gender-Pay-Gap-Study.pdf (last visited Oct. 3, 2018).

would resort to compensating every employee at the *lowest* wage without regard to merit.

The former would increase payroll budgets exponentially, while the latter would severely impede efforts to attract the best talent and produce the highest quality product, thus ensuring a quick race to the bottom, rather than to the top. Under either scenario, American businesses would be placed at a significant and extremely damaging competitive disadvantage.

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

KAREN R. HARNED
ELIZABETH MILITO
NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER
1201 F Street, N.W.
Suite 200
Washington, DC 20004
(202) 406-4443

Attorneys for *Amicus Curiae* National Federation of Independent Business Small Business Legal Center

RAE T. VANN
Counsel of Record
DANNY E. PETRELLA
NT LAKIS, LLP
1501 M Street, N.W.
Suite 1000
Washington, DC 20005
rvann@ntlakis.com
(202) 629-5600

Attorneys for *Amicus Curiae* Center for Workplace Compliance

October 2018

No. 18-272

IN THE

Supreme Court of the United States

JIM YOVINO,

Petitioner,

v.

AILEEN RIZO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF PETITIONER

DARYL L. JOSEFFER
MICHAEL B. SCHON
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JONATHAN S. FRANKLIN
Counsel of Record
PETER B. SIEGAL
NORTON ROSE FULBRIGHT US LLP
799 9th Street, N.W., Suite 1000
Washington, D.C. 20001
(202) 662-0466
jonathan.franklin@nortonrosefulbright.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTERESTS OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 3

REASONS FOR GRANTING CERTIORARI 4

I. THE DECISION BELOW DEEPENS A CIRCUIT SPLIT ON THE LEGALITY OF A WIDELY USED AND USEFUL EMPLOYMENT PRACTICE 4

A. Reliance On Prior Pay Is Widespread And Legal In Most Jurisdictions. 5

B. Reliance On Prior Pay Is A Sex-Neutral Practice. 9

II. THE NINTH CIRCUIT'S RULE CALLS INTO QUESTION LEGITIMATE AND SEX-NEUTRAL EMPLOYMENT PRACTICES THAT RELY ON OBJECTIVE INFORMATION. 12

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

CASES:

Aldrich v. *Randolph Cent. Sch. Dist.*, 963 F.2d 520 (2d Cir. 1992) 4

Beck-Wilson v. *Principi*, 441 F.3d 353 (6th Cir. 2006) 4

Irby v. *Bittick*, 44 F.3d 949 (11th Cir. 1995) 4

Republic of Iraq v. *Beaty*, 556 U.S. 848 (2009) 13

Riser v. *QEP Energy*, 776 F.3d 1191 (10th Cir. 2015) 5

Taylor v. *White*, 321 F.3d 710 (8th Cir. 2003) 4

Washington Cty. v. *Gunther*, 452 U.S. 161 (1981) 17

Wernsing v. *Dep't of Human Servs.*, 427 F.3d 466 (7th Cir. 2005) 4, 5

STATUTES:

29 U.S.C. § 203(e)(2)(iii) 6

29 U.S.C. § 206(d)(1) 3, 13

Mich. Comp. Laws § 123.1384(4) 7

Wis. Stat. § 103.36(3)(a) (2018) 7

OTHER AUTHORITIES:

Bus. Mgmt. Daily, *Use Objective Criteria—and Beware Subjective Judgment Calls—When Deciding Promotions* (Feb. 21, 2010) (https://tinyurl.com/yatqaoj5) 15

TABLE OF AUTHORITIES—Continued

Page(s)

Áine Cain, *et al.*, Bus. Insider, *9 Places In The US Where Job Candidates May Never Have to Answer the Dreaded Salary Question Again* (Apr. 10, 2018) (https://tinyurl.com/yc6odzs6) 7

Fabiola Cineas, Philadelphia Mag., *Here's How the Wage Equity Law Kenney Just Signed Could Hurt Women* (Jan. 23, 2017) (https://tinyurl.com/ybkrpkv5) 16

Christine Elzer, *Wheeling, Dealing, and the Glass Ceiling: Why the Gender Difference in Salary Negotiation Is Not a "Factor Other Than Sex" Under the Equal Pay Act*, 10 Geo. J. Gender & L. 1, 33-35 (2009) 15

Amy Gallo, Harv. Bus. Rev. Online, *Setting the Record Straight: Using an Outside Offer to Get a Raise* (July 5, 2016) (https://tinyurl.com/jhm2eub) 13

HRDive, *Amazon Bans Salary History Inquiries* (Jan. 19, 2018) (https://tinyurl.com/yajn5bhm) 8

HRDive, *Salary History Bans: A Running List of States and Localities That Have Outlawed Pay History Questions* (Aug. 24, 2018) (https://tinyurl.com/y6urjl4x) 7

Heather Huhman, Huffington Post, *5 Ways to Be Objective in Your Hiring Process* (May 7, 2013) (https://tinyurl.com/y992lyq7) 15

TABLE OF AUTHORITIES—Continued

Page(s)

Korn Ferry, *Korn Ferry Executive Survey: New Laws Forbidding Questions On Salary History Likely Change The Game For Most Employers* (Nov. 14, 2017) (https:// tinyurl.com/y9gb4aru) 5, 17

Jen Hubley Luckwaldt, PayScale, *When Should You Use an Outside Offer to Negotiate Salary?* (July 11, 2016) (https://tinyurl.com/ybsf6n3l) 13

Roy Maurer, Soc'y for Hum. Res. Mgmt., *Employers Split on Asking About Salary History* (Apr. 2, 2018) (https://tinyurl.com/ycrpcp42) 5, 8

Yuki Noguchi, Nat. Pub. Radio, *More Employers Avoid Legal Minefield By Not Asking About Pay History* (May 3, 2018) (https://tinyurl.com/y8d44oqk) 8

Yuki Noguchi, Nat. Pub. Radio, *Proposals Aim to Combat Discrimination Based on Salary History* (May 30, 2017) (https://tinyurl.com/ya67hrua) 6, 11

Recent Legislation, *Oregon Bans Employers From Asking Job Applicants About Prior Salary*, 131 Harv. L. Rev. 1513, 1520 (2018) 6, 17

Noam Scheiber, N.Y. Times, *If a Law Bars Asking Your Past Salary, Does It Help or Hurt?* (Feb. 16, 2018) (https://nyti.ms/2C1mmMX) 16

TABLE OF AUTHORITIES—Continued

Page(s)

Small Bus. & Entrepreneurship Council, *Facts & Data on Small Business and Entrepreneurship* (https://tinyurl.com/yby8j54r) 8

Toni Vranjes, Soc'y for Hum. Res. Mgmt., *Reduce the Legal Risks of Performance Reviews* (Feb. 19, 2016) (https://tinyurl.com/y8f9et2u) 15

IN THE

Supreme Court of the United States

No. 18-272

JIM YOVINO,

Petitioner,

v.

AILEEN RIZO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF PETITIONER

INTERESTS OF AMICI CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation.[1] It represents 300,000 direct

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the Chamber, its members, or its counsel made a monetary contribution to this brief's preparation or submission. Both parties were timely notified more than 10 days

members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every geographic region of the country. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts. To that end, the Chamber routinely files amicus briefs in cases, such as this one, involving issues of national concern to business.

The Society for Human Resource Management (SHRM) is the world's largest HR professional society, representing 300,000 members in more than 165 countries. For nearly seven decades, the Society has been the leading provider of resources serving the needs of HR professionals and advancing the practice of human resource management. SHRM has more than 575 affiliated chapters within the United States. Since its founding, one of SHRM's principal missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to the realities of the workplace.

Amici and their members have a strong interest in ensuring that the laws that govern hiring and compensation practices are fair, predictable, and uniformly interpreted. The court of appeals' decision deepens a circuit split regarding the viability of widely used and important employment practices that help both employers and employees. If left in place, the Ninth Circuit's judgment would not only exacerbate a glaring disuniformity in federal law but also have significant negative effects on hiring and compensation practices across the country.

---

in advance of the Chamber's intent to file this brief and have consented to its filing.

SUMMARY OF THE ARGUMENT

The Equal Pay Act permits pay disparities based on "any * * * factor other than sex." 29 U.S.C. § 206(d)(1). In the opinion below, the Ninth Circuit, sitting *en banc*, held that prior salary is not a "factor other than sex," and, as a result, cannot permissibly be used to set salaries unless it results in identical pay across genders.

The question presented in this case is whether a widely used practice—one that has long been understood as justified for reasons that have nothing to do with sex—is now illegal. That question is of extraordinary significance. Employers large and small, in every region of the United States, have historically used prior salary as a metric to assess a range of matters, including the caliber and experience of applicants, the viability and competitiveness of their own compensation packages, and, ultimately, the fairness of the wages they pay to employees. By placing wage-history data off limits for employers within the nation's largest circuit, the court of appeals' rule exacerbates a clear, acknowledged split regarding the legal viability of that important practice.

The Ninth Circuit's tortured reading of the EPA's "catchall" defense also threatens the viability of a broad array of employment practices, such as individualized negotiation and competitive salary bidding, that include a reliance on prior pay. And, by depriving employers of the ability to rely on an objective measure of an applicant's market salary and legitimate expectations, the Ninth Circuit's rule encourages decisionmaking based on subjective factors—which is precisely what employment law generally seeks to avoid. Indeed, because subjective estimates of a market salary may tend to reflect

outdated or inaccurate information, the court of appeals' rule could lead to greater pay disparities, thus disadvantaging applicants—both female and male—who were particularly valued by their prior employers.

For these reasons, and those in the petition, the Court should grant certiorari.

REASONS FOR GRANTING CERTIORARI

I. THE DECISION BELOW DEEPENS A CIRCUIT SPLIT ON THE LEGALITY OF A WIDELY USED AND USEFUL EMPLOYMENT PRACTICE.

As the petition explains, the federal courts of appeals disagree sharply about the permissibility of using prior salary to set employee pay. The Ninth Circuit held that "it is impermissible to rely on prior salary to set initial wages." Pet. App. 27a. The Seventh and Eight Circuits, by contrast, have held that, absent some case-specific reason for skepticism, the use of prior pay is categorically acceptable. *See, e.g.*, *Wernsing* v. *Dep't of Human Servs.*, 427 F.3d 466, 468 (7th Cir. 2005); *Taylor* v. *White*, 321 F.3d 710, 717 (8th Cir. 2003). The Second and Sixth Circuits permit employers to rely on prior pay as long as they prove that such use is "rooted in legitimate business-related" concerns. *Aldrich* v. *Randolph Cent. Sch. Dist.*, 963 F.2d 520, 525-27 (2d Cir. 1992); *see also, e.g.*, *Beck-Wilson* v. *Principi*, 441 F.3d 353, 365 (6th Cir. 2006). And the Tenth and Eleventh Circuits permit the use of prior pay only "as part of a mixed-motive" mode of setting salaries that relies on other factors as well. *Irby* v. *Bittick*, 44 F.3d 949, 955 (11th Cir. 1995);

see also, e.g., *Riser* v. *QEP Energy*, 776 F.3d 1191, 1199 (10th Cir. 2015).[2]

A. Reliance On Prior Pay Is Widespread And Legal In Most Jurisdictions.

That patchwork interpretation of federal law is intolerable for Amici's members, particularly given the widespread nature of the practice at issue. As the petition notes, a recent study showed that, in jurisdictions in which it is permitted, more than 60% of employers allow interviewers to ask about prior salary. Roy Maurer, Soc'y for Hum. Res. Mgmt., *Employers Split on Asking About Salary History* (Apr. 2, 2018) (https://tinyurl.com/ycrpcp42). Other studies confirm employers' widespread reliance on prior pay. One 2017 study found that 65% of executives believe their operations would be affected by a ban on questions about prior pay, such that if a nationwide ban were imposed, "hundreds of thousands of employers w[ould] need to modify their talent screening and hiring processes." Korn Ferry, *Korn Ferry Executive Survey: New Laws Forbidding Questions On Salary History Likely Change The Game For Most Employers* (Nov. 14, 2017) (https://tinyurl.com/y9gb4aru). Virtually none of those employers consider themselves "well prepared" to handle such a ban. *Id.*

As this case demonstrates, it is not just private employers that find it useful to ask about and rely on salary history when making decisions about recruitment, compensation, and retention. The

---

[2] As the petition makes clear, the use of prior salary—like the use of any other factor—is impermissible in any circuit if invoked as a pretext for sex discrimination. *See, e.g.*, *Wernsing*, 427 F.3d at 469.

standard application for employment with the Judicial Branch of the United States requires applicants to list their starting and final salary at each job they held in the past ten years. *See* Federal Judicial Branch, *AO 78: Application for Employment* (www.uscourts.gov/sites/default/files/ao078.pdf); *cf.* 29 U.S.C. § 203(e)(2)(iii) (Equal Pay Act applies to Judicial Branch units with positions in the competitive service). The Judicial Branch's Pre-Employment Information form calls for even more data, including information about past retirement plans, the impact of cost-of-living adjustments on prior pay, and a variety of other specifics. *See* Federal Judicial Branch, United States Government, *AO 425: Pre-Employment Information* (www.uscourts.gov/sites/default/files/ao425.pdf).

Reliance on prior pay, moreover, is legal almost everywhere. A few jurisdictions, including California, Massachusetts, Oregon, Delaware, and the Cities of New York and Philadelphia, among a handful of others, have enacted legislation either barring employers from asking for job applicants' salary history or eliminating salary history as a justification for pay discrepancies. *See* Yuki Noguchi, Nat. Pub. Radio, *Proposals Aim to Combat Discrimination Based on Salary History* (May 30, 2017) (https://tinyurl.com/ya67hrua); *see also* Recent Legislation, *Oregon Bans Employers From Asking Job Applicants About Prior Salary*, 131 Harv. L. Rev. 1513, 1520 (2018). But most jurisdictions have left the practice of relying upon pay history undisturbed.

Some jurisdictions have even gone in the opposite direction from the Ninth Circuit: earlier this year, both Michigan and Wisconsin enacted laws *forbidding* localities to adopt salary-history bans and other

restrictions on the information employers can seek from applicants. *See* Mich. Comp. Laws § 123.1384(4) ("A local governmental body shall not adopt, enforce, or administer an ordinance, local policy, or local resolution regulating information an employer or potential employer must request, require, or exclude on an application for employment or during the interview process from an employee or a potential employee"); Wis. Stat. § 103.36(3)(a) (2018) ("No city, village, town, or county may enact or enforce an ordinance prohibiting an employer from soliciting information regarding the salary history of prospective employees.").

The vast majority of state and local jurisdictions therefore have declined to disturb the longstanding practice of relying on prior pay, despite having had ample opportunity to do so. Indeed, one can travel from Nevada to Pennsylvania without passing north of, south of, or through any state or municipality that has outlawed private employers' reliance on salary history. *See* Áine Cain, *et al.*, Bus. Insider, *9 Places In The US Where Job Candidates May Never Have to Answer the Dreaded Salary Question Again* (Apr. 10, 2018) (https://tinyurl.com/yc6odzs6); HRDive, *Salary History Bans: A Running List of States and Localities That Have Outlawed Pay History Questions* (Aug. 24, 2018) (https://tinyurl.com/y6urjl4x).

Moreover, there is reason to believe that the results noted above actually understate the impact of this case. Among the roughly one-third of employers that do not rely on salary history even in jurisdictions where it is permitted, many are "large[] * * * organization[s]" that have reacted to legal uncertainty by adopting companywide policies to comply with the strictest rules to which they are subject anywhere.

Maurer, *Employers Split on Asking About Salary History*, *supra*; *see also, e.g.*, Yuki Noguchi, Nat. Pub. Radio, *More Employers Avoid Legal Minefield By Not Asking About Pay History* (May 3, 2018) (citing survey finding that "46 percent of employers said they would adopt policies to comply with the strictest laws in their region") (https://tinyurl.com/y8d44oqk); HRDive, *Amazon Bans Salary History Inquiries* (Jan. 19, 2018) (quoting internal memorandum stating that Amazon took "a proactive stance" of banning salary-history questions in order to be "consistent for all candidates * * * in * * * the United States") (https://tinyurl.com/yajn5bhm). Those employers show up as false negatives in the surveys, because they would ask about prior pay if it were permissible in more jurisdictions. It is therefore likely that far more than two-thirds of employers in the United States would, if left to their own devices, ask about and rely upon information about prior pay. For these larger national employers, the Ninth Circuit's decision has consequences far beyond that Circuit's territorial borders.

For other employers of all sizes, the circuit split means that the legal standard varies depending on where they happen to be located. The vast majority of employers in the United States operate in jurisdictions in which reliance on salary history is entirely legal. An overwhelming percentage of American businesses operate locally, and therefore have no reason to comply with bans in the few coastal states that have enacted them. Of the 5.6 million employer firms in the United States, 99.7% are small businesses with fewer than 500 employees. Small Bus. & Entrepreneurship Council, *Facts & Data on Small Business and Entrepreneurship*

(https://tinyurl.com/yby8j54r). Those firms employ nearly half of all employed Americans. *Id.* Thus, while rules adopted in large states can exert an outsize influence on some large employers, tens of millions of American job-seekers and employees continue to live and work in jurisdictions in which reliance on salary history is both permitted and commonplace. They therefore operate under an entirely different federal-law regime with respect to the use of prior pay than their counterparts in the Ninth Circuit and the other circuits that have circumscribed the practice in lesser ways. The Court should grant certiorari to restore uniformity to the law.

B. Reliance On Prior Pay Is A Sex-Neutral Practice.

As the practice's widespread nature tends to suggest, many employers rely on prior salary for reasons having nothing to do with sex. For instance, in litigation over Philadelphia's attempt to legislate on this issue, the Chief Diversity Officer of a major media company that is one of the Nation's largest employers attested that his company "inquires about and relies on wage history for a number of legitimate reasons." [3] Those reasons include the need to "determine the market wage" for a given job and to evaluate "the level of responsibility the applicant had at his or her prior job."[4] He further attested that data about items such as prior bonus payouts and vested and unvested equity from a current employer are

---

[3] Decl. of David L. Cohen ("Cohen Decl."), Comcast Corp., Dkt. 29-4, *Chamber of Commerce for Greater Phila.* v. *City of Phila*, No. 2:17-cv-01548-MSG, ¶ 8 (E.D. Pa. June 13, 2017).

[4] *Id.* ¶ 9(a)-(d).

critical to the company's ability to generate an appropriate compensation offer competitive with what the applicant might be "leaving behind."[5] Moreover, wage history can "signal[] the value that the candidate's prior employer placed on his or her work," which is particularly relevant for a sales- or commission-based job.[6]

In the same litigation, the Senior Vice President for Human Resources of a large hospital attested that his company's efforts to maintain "a diverse workforce" turn not only on effective recruitment—for which information about prior pay is vital—but also on effective retention.[7] As he testified, while "it is *essential* to know the total compensation package that [an] applicant currently receives * * * in order to make an attractive offer," information about each applicant's likely "starting point" in negotiations also provides the hospital "flexibility" to "reserve funds for promotions or other rewards for good work or longevity."[8] Without the "flexibility" provided by access to prior-pay information, the hospital fears, it "could see increased churn among its employees."[9]

Information about prior pay is also of great concern to smaller companies. Those companies are often unable to commission market compensation studies,

---

[5] *Id.* ¶ 9(c).

[6] *Id.* ¶ 9(b).

[7] Decl. of Robert Croner ("Croner Decl."), the Children's Hospital of Philadelphia, Dkt. 29-5, ¶ 9(b), *Chamber of Commerce for Greater Phila.* v. *City of Phila*, No. 2:17-cv-01548-MSG (E.D. Pa. June 13, 2017) (emphasis added).

[8] *Id.* ¶ 8, 9(b) (emphasis added).

[9] *Id.* ¶ 9(b).

even though many of them operate in industries where high turnover rates require near-constant salary adjustments. For example, the owner of a small document management company testified in the Philadelphia litigation that "[o]ffering a premium" over prior pay is particularly "essential" to the hiring of professional truck drivers.[10] In that industry, the turnover rate can exceed 80%, as drivers routinely leave one organization for a higher-paying trucking job elsewhere.[11] To offer the raises that are critical to its recruiting efforts, the company "needs to know what a given driver is currently making so that it can adjust its salary offer accordingly."[12] The company "commonly will offer a premium on an applicant's previous or current compensation to show how valued that applicant is."[13]

Even if an employer cannot match a prior salary, prior-pay information conserves resources by streamlining the hiring process. Many employers ask about prior salary "not in order to discriminate," but because "[t]hey don't want to waste the time of a candidate who's seeking a higher salary than they can offer." Noguchi, *Proposals Aim to Combat Discrimination Based on Salary History*, *supra*. Wage-history questions save "significant time and resources" in the hiring process, for both applicants and employers, by enabling employers to determine whether an

---

[10] Decl. of Keith DiMarino, Dkt. 29-7, ¶ 8, *Chamber of Commerce for Greater Phila.* v. *City of Phila*, No. 2:17-cv-01548-MSG (E.D. Pa. June 13, 2017).

[11] *Id.*

[12] *Id.*

[13] *Id.* ¶¶ 11(a)-(c).

applicant would be able to work within the salary guidelines of a given company.[14]

These are all legitimate reasons for inquiring about prior pay that have nothing to do with an applicant's sex. And the benefits associated with them accrue to both male and female employees. As shown by this case, where an employer has guaranteed a raise to every new employee, many employees will benefit from sharing their past salaries. In the Philadelphia case, one business owner testified that his company had recently offered to increase one candidate's bonus by 75% over that offered at the candidate's previous job, and offered another applicant a 30% premium over the prevailing market rate in light of her prior salary.[15] If employers were unable even to consider such data, applicants' ability to benefit from extraordinary performance in prior jobs would be sharply curtailed.

II. THE NINTH CIRCUIT'S RULE CALLS INTO QUESTION LEGITIMATE AND SEX-NEUTRAL EMPLOYMENT PRACTICES THAT RELY ON OBJECTIVE INFORMATION.

The court of appeals based its decision on the conclusion that, under the EPA's "catchall" defense, the only legitimate "factor[s] other than sex" are those that measure "work experience, ability, performance, or any other job-related quality." Pet. App. 12a, 25a. That rationale would not justify the Ninth Circuit's decision even on its own terms, given that prior pay is

---

[14] Croner Decl. ¶ 9(a); *see also* Cohen Decl. ¶ 9 (information assesses whether an applicant would be willing to work within the "predetermined budget assigned to" each open position).

[15] *Id.* ¶¶ 11(c), 10(a).

plainly job-related and that prospective employers use it to measure an applicant's performance in prior jobs. *See supra* at 9-12. More fundamentally, the court's broad holding is contrary to the statute, which, by its plain text, permits an employer to invoke "*any* * * * factor other than sex" as a defense. 29 U.S.C. § 206(d)(1) (emphasis added); *cf. Republic of Iraq* v. *Beaty*, 556 U.S. 848, 856 (2009) ("Of course the word 'any' * * * has an expansive meaning."). Moreover, it threatens to invalidate, without any statutory warrant, many other employment practices that are equally as valuable and widely accepted as reliance on prior pay.

For example, it is extremely common for both applicants and employees to seek better pay by informing employers not only of past salaries, but of other offers available at the time of the negotiation. *See, e.g.*, Amy Gallo, Harv. Bus. Rev. Online, *Setting the Record Straight: Using an Outside Offer to Get a Raise* (July 5, 2016) (outside offers are "recognized as a legitimate way to get * * * higher compensation") (https://tinyurl.com/jhm2eub); *see also* Jen Hubley Luckwaldt, PayScale, *When Should You Use an Outside Offer to Negotiate Salary?* (July 11, 2016) (providing strategic advice for applicants) (https://tinyurl.com/ybsf6n3l). This strategy almost uniformly benefits prospective employees and the labor market more generally: by informing a current or prospective employer of alternative salary offers, applicants and employees hope to encourage matching or higher offers. The ability to bargain in that manner is a basic aspect of any market.

Under the court of appeals' reasoning, however, that practice may be suspect. There is no apparent reason why reliance on pay associated with *current* job offers

would be any more or less discriminatory than reliance on pay associated with *past* jobs. Moreover, if, as the Ninth Circuit held, the pay one earned in past positions is not related to "work experience, ability, performance, or [otherwise] job-related quality," *cf.* Pet. App. 12a, then the pay one has been offered for an alternative position would seem to be no different. The Ninth Circuit's opinion therefore poses a significant threat not just to reliance on prior pay, but to competitive salary bidding altogether.

In addition, although the Ninth Circuit purported to reserve the question whether past salary may play a role in individualized salary negotiations—as distinguished from petitioner's across-the-board pay scale—its decision threatens that practice as well. As Judges McKeown and Callahan explained in concurrences below, the court of appeals' rationale "makes it impermissible to rely on prior salary to set initial wages," and therefore, "[i]n the real world," leaves "little daylight for arguing that negotiated starting salaries should be treated differently than established pay scales." Pet. App. 36a (McKeown, J.), 49a n.10 (Callahan, J.) (noting that despite court of appeals' reservation, its "conclusion that past salary cannot be considered alone *or* in conjunction with less invidious factors" established a bright-line rule covering negotiations as well) (emphasis added). The Ninth Circuit's *ipse dixit* "disclaimer" regarding negotiations "hardly cushions" the logical effect of its ruling, which could be viewed as prohibiting reliance on prior salary in formal pay scales and salary negotiations alike. *Id.*

It is also not clear whether the Ninth Circuit's rule permits *any* negotiated salary differential, even where negotiations do not turn on the applicant's prior pay.

Some have argued, based on studies asserting that men and women differ in their propensity to negotiate, that pay differentials based on salary negotiations necessarily violate the Equal Pay Act. *See, e.g.*, Christine Elzer, *Wheeling, Dealing, and the Glass Ceiling: Why the Gender Difference in Salary Negotiation Is Not a "Factor Other Than Sex" Under the Equal Pay Act*, 10 Geo. J. Gender & L. 1, 33-35 (2009). Although no court has yet endorsed that conclusion, the Ninth Circuit's decision, which severely circumscribes the catchall defense, threatens to chill that commonplace practice as well.

Moreover, and setting aside particular pay practices, the Ninth Circuit's rule undermines the accepted understanding that, in making employment and compensation decisions, employers should strive whenever possible to rely on objective data. [16] Reliance on such data avoids even an appearance of implicit bias. Employers rely on wage history precisely because it is an objective, reliable indicator of a wide range of useful facts about a given applicant,

---

[16] *See, e.g.*, Heather Huhman, Huffington Post, *5 Ways to Be Objective in Your Hiring Process* (May 7, 2013) ("Employers need to be objective when hiring new employees to ensure they provide equal opportunities for every job seeker who applies. By applying these ideas to your hiring process, you will be able to select a candidate with accuracy and fairness.") (https://tinyurl.com/y992lyq7); *see also* Toni Vranjes, Soc'y for Hum. Res. Mgmt., *Reduce the Legal Risks of Performance Reviews* (Feb. 19, 2016) ("Employers should strive to evaluate workers on objective factors, like meeting sales numbers or meeting project deadlines.") (https://tinyurl.com/y8f9et2u); Bus. Mgmt. Daily, *Use Objective Criteria—and Beware Subjective Judgment Calls—When Deciding Promotions* (Feb. 21, 2010) ("Nothing speeds a disappointed job-seeker's trip to court like a selection process based on an employer's use of subjective criteria.") (https://tinyurl.com/yatqaoj5).

including the value that a prior employer has placed on a particular employee and that employee's legitimate salary expectations. *See supra* at 9-12.

If employers are prohibited from inquiring about or relying on that objective information, they may rely on more subjective factors that would be imperfect substitutes for the banned data. One economist has opined that if employers "cared enough about [prior salary] to ask [about] it to begin with, they probably care about it enough to try to guess." Noam Scheiber, N.Y. Times, *If a Law Bars Asking Your Past Salary, Does It Help or Hurt?* (Feb. 16, 2018) (quoting Jennifer Doleac, an economist at the University of Virginia) (https://nyti.ms/2C1mmMX). Thus, some employers who are prohibited (or otherwise discouraged) from seeking useful, objective data about applicants may instead make guesses about what the data would be if it were available. *See* Fabiola Cineas, Philadelphia Mag., *Here's How the Wage Equity Law Kenney Just Signed Could Hurt Women* (Jan. 23, 2017) (https://tinyurl.com/ ybkrpkv5). That would not be surprising where pay is negotiated, since any party to a negotiation must make assumptions about the legitimate expectations of its counterparty. Thus, banning reliance on prior pay may encourage employers to rely on subjective estimates about an applicant's true expectations, rather than on objective data.

There is no reason to think those guesses will help alleviate pay disparities. To the contrary, if employers cannot rely on accurate and truthful information about what applicants have in fact been paid in the past, some may tend to rely instead on

outdated assumptions.[17] In doing so, they may underestimate applicants' prior pay, thereby leading to greater wage discrepancies than if accurate information were available. Indeed, precluding employers from learning about or relying on prior salary could particularly disadvantage applicants who are already well-paid by their current employers. *See* Recent Legislation, *supra* (discussing Oregon statute banning prior-pay defense, and noting that although it may help plaintiffs who bring claims, "its overall effect on wage setting is uncertain (and perhaps undesirable)"). It is likely for that reason that, even apart from the inefficiencies created by prior-pay bans, nearly two-thirds of executives in one recent study concluded that such bans would be ineffective in "actually improv[ing]" gender pay equity. *See Korn Ferry Survey*, *supra*.

This Court's review is warranted to ensure that, as Congress intended, *see Washington Cty.* v. *Gunther*, 452 U.S. 161, 170-71 (1981), the Equal Pay Act leaves in place legitimate compensation practices that are based on factors other than sex. The courts should not effectively amend the plain language of the statute where Congress, which is best equipped to assess the costs associated with a salary-history ban, has not seen fit to do so. Nor should this Court leave in place an entrenched and widely acknowledged circuit split on this critical issue of federal law.

---

[17] Employers may rely in part on other business factors in setting an individual's pay. These include factors such as market competition, employer size, whether the employer is public or private, level of product demand, industry characteristics, value of each position to the organization, and competitors' pay rates.

CONCLUSION

For the foregoing reasons and those in the petition, the Court should grant the petition for certiorari and reverse the judgment below.

Respectfully submitted,

DARYL L. JOSEFFER
MICHAEL B. SCHON
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JONATHAN S. FRANKLIN
Counsel of Record
PETER B. SIEGAL
NORTON ROSE FULBRIGHT US LLP
799 9th Street, N.W., Suite 1000
Washington, D.C. 20001
(202) 662-0466
jonathan.franklin@nortonrosefulbright.com

Counsel for Amici Curiae

October 4, 2018